75-1915

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. _____

Blanche David,
Petitioner

v.

State of California, Cecil E. Pope & Margaret S. Pope, Cecil E. Pope & Margaret S. Pope, and Their Insurers of Contingent Liabilities, John A. Putkey, Duane E. Clapp, Jr., Richard B. Melbye,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Blanche David, Proprie Persona
2826 Tiburon Way
Burlingame, California 94010
Petitioner, Per Se

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Pope and Margaret S. Pope v. Blanche David, First Doe, Second and Third Doe, Complaint #148707

H. Newspaper Account re: Indispensable Parties (Land Developers, et al.) - "Landslides" Settlements

I. Declaration of Joseph Jedeikin In Support Of Motion To Set Aside Default

J. November 30, 1970 Proceedings re: Pope, et al. v. David, et al. Miss Blanche David is not the owner; Mr. Putkey learned of that fact and in Summer of 1970 caused her brother to be sued as First Doe; Correspondence from Miss David; Affidavit is defective relative to CCP Section 587

K. Affidavit in Support Of Motion For New Trial Filed December 11, 1970 and PROOF of OWNERSHIP Document attached thereto, namely, GRANT DEED showing that Matherson Construction Inc. does hereby grant to Walter Dawydiak the real property Lot 11, Block 32, et al. on June 11, 1959

L. December 29, 1970 Proceeding - Arguments re: CCP Sections 473 and 473(a). Her Attorney argues that the Superior Court does have the power to do equity; that Walter Dawydiak is the owner and not Miss David; that Lawyer John A. Putkey even though he knew that J. Jedeikin, Esq. is Mr. Dawydiak's attorney "attempted to have a default entered against Mr. Dawydiak, and fortunately, his request to enter a default was not filed in time and a demurrer for Mr. Dawydiak was filed, but it

just seems incomprehensible to me how an attorney can proceed wanting to enforce a judgment which he knows is inequitable."

M. Claims made by Cecil E. Pope, et al.'s Insurer's Lawyers that California Law says, "It is perfectly proper to sue several co-defendants, take a default judgment against one defendant, and proceed against the remaining defendants." They treat Walter Dawydiak's Deed with contempt, as well as all his Legal Rights, etc.

N. November 30, 1970 Blanche David voluntarily for the first time appeared in Court with an Attorney to Set Aside all illegally-decreed Court Orders, etc. and to Present Evidence Contradicting the Perjurers

O. Decision of: The Court Of Appeal Of The State Of California, First Appellate District, Division One - Upholding The Lower Court's illegally-decreed Default Judgment, etc. FILED: February 13, 1973

P. Decision of: The Court Of Appeal Of The State Of California, First Appellate District, Division Three - Upholding the Dismissal Of Her Suit To Sue Cecil E. Pope, Margaret S. Pope, and John A. Putkey for malicious prosecution, negligence, fraudulent misrepresentation and abuse of process. FILED: May 30, 1975

Q. Two (2) Newspaper Articles. 1. Re: Superior Court Judge Robert Kroninger Sets Aside The $690,000 Default Judgment entered against JAGGER and his ROLLING STONES last year by

another Judge - 2. Re: U. S. Judge may find Hughes in Default for Failing to Appear for SEC Questions, etc.

R. Order of Examination in Cecil E. Pope and Margaret S. Pope v. Blanche David, et al., Complaint #148707 Ordered by Superior Court Judge C. Brookes Ice on 24 August 1971

S. Pope v. David, et al. - Alleged Defendant Blanche David is required to file an undertaking pending appeal from judgment taken against her in subject proceedings. She deposits 6% Treasury Notes in the face amount of $9,000.00 plus interest coupons - FILED by her Lawyer Orville I. Wright with Superior Court For The County Of San Mateo on October 5, 1971

T. Appeals lost by Blanche David - Marvin Church, Clerk, In The Superior Court Of The State Of California In And For The County Of San Mateo Orders Order For Sale Of Notes To Take Place And Notice Of Entry In Judgment Book is made on July 6, 1973 in Cecil E. Pope, et al. v. Blanche David, et al. Complaint #148707, WHILE the remaining alleged Defendant (Walter Dawydiak) is still pending. Mr. Dawydiak received payments from Cecil E. Pope, et al. in November 1975, see APPENDIX G. Said checks are still uncashed

U. Decision re: THOMAS J. FROW v. THOMAS DE LA VEGA, 15 Wall (82 U.S.) 552, (1872) 21 L.Ed. 60

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner Blanche David prays that a writ of certiorari issue to review the judgment, opinion and orders of the United States Court of Appeals For The Ninth Circuit entered in this proceeding on March 15, 1976.

OPINIONS BELOW

Petitioner, acting in Propria Persona, hereby petitions this Court, which has authority under

28 U.S.C. §1254(1) to issue writs of certiorari to consider questions where Petitioner seeks reversal of infirm Orders of Court of Appeals, entered March 15, 1976, which are in direct conflicts (a) with Decisions of The Supreme Court Of The United States and with other Circuit Courts correctly complying therewith; consequently such mistakes or contempts are compounding her substantive injuries, and (b) with Petitioner's Constitutionally-Guaranteed Rights to seek appropriate Judicial Review and Remedy in the Federal Courts from Respondent State of California's void default judgment illegally-decreed and fraudulently-obtained on April 2, 1970 against Petitioner Blanche David one of several misjoindered multidefendants separately before any of the misjoindered multidefendants acquired knowledge of the unconstitutional lawsuit instigated by Respondents Cecil E. Pope and Margaret S. Pope, or were allegedly served with legal papers thereof, and such unlawful decreeing against Blanche David by Respondent State of California Superior Court is reckless and in open defiances of Precepts laid down in 1872 by The Supreme Court Of The United States in Frow v. De La Vega, 15 Wall (82 U.S.) 552, 21 L.Ed. 60; Hovey v. Elliott, 167 U.S. 409 /414, etc./, et al., which Decisions The Ninth Circuit also misconstrued in favor of Respondents. Consequently, the two Federal Courts never had the opportunity to examine the transcripts of the State of California Court Proceeding, wherein she was persecuted. Said Proceeding by itself is so inflammatory and contaminated with judicial arrogances, extrinsic frauds, bias, and prejudices wilfully committed against Blanche David that the only appropriate remedy the Superior Court should have ordered in July 1970 or at least in November or December 1970 was Dismissal of Respondents Cecil E. Pope and Margaret S. Pope's suit against the misjoindered multidefendant Blanche David instead of tyrannically retaining and enforcing its void default

judgment against her and real estate property located at 2826 Tiburon Way, Burlingame. Calif., which is solely owned by her brother.

Equally shocking are the facts (a) that twice the two (2) Courts of Appeal Of The State Of California, First Appellate District, upheld the illegal decrees of the lower court, and (b) that The Supreme Court Of The State Of California twice denied Petitioner her two Appeals for Due Course of Justice, etc.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED - RULE 19 OF SUPREME COURT RULES

Ninth Circuit's conflicts with Decisions of The Supreme Court of the United States and Court of Appeals, Eighth Circuit barring the entry of a default judgment against one of several multidefendants before a trial is held on the merits as to the remaining multidefendants, require review by this Court.

Eighth Circuit in Roach v. Churchman, 431 F.2d 849 assents to this Court's preferred practice procedures for judges to withhold granting a default judgment against one of several multidefendants, while the action on the merits is still pending against the remaining multidefendants. Whereas Ninth Circuit; the U. S. District Court, N. D. of California, and the State of California Courts dissent therefrom. Consequently, those discords as to the practice of withholding granting a default judgment have emasculated Petitioner Blanche David's Constitutionally-Guaranteed Rights, Privileges, Immunities, etc; Rights to Due Process of the Laws, Equal Protections and Treatments thereof; Rights to ever vacate the State of California Superior Court's April 2, 1970 void Default Judgment granted against Blanche David which default judgment also violates the Precedents in Frow v. De La Vega, supra, and Hovey v. Elliott,

supra, etc. as well as Hughes Tool Co. v. Trans World Airlines, Inc., 405 U.S. 915, and Federal Constitution and Its Amendments, etc.

Due to those unexpected obstacles within the Federal Courts in San Francisco, California, Petitioner is still suffering from miscarriages of justice stemming from State of California Superior Court's illegal acts and actions against person and subject; all its illegally-decreed Court Orders; its violations of the Commands of The Supreme Court of The United States in the matter of withholding the granting of a default judgment, in the matter of granting due process of the laws, equal protections and equal treatments of the laws, etc; from the Federal Court's inabilities to understand those injustices, and the Ninth Circuit erroneously concurring with the State of California Superior Court's (a) illegal granting of a default judgment on April 2, 1970 against a Blanche David in absentia, one of the misjoindered multidefendants, etc., and erroneously sustained by the State of California Court of Appeal, First District, on February 13, 1973 against her and (b) wilfully depriving Blanche David of her Constitutionally-Guaranteed Rights to Due Process of the Laws, to Equal Treatments and Equal Protections of the Laws.

The Complaint's caption in Case No. 148707 shows that Blanche David was sued together with multidefendants. The State Court records also show that she was absent during the stages she was illegally prosecuted; that there was no lawyer during any of those times to defend her; without the presence of remaining multidefendants; without joinders of the indispensable parties legally liable to be sued by Respondents Cecil E. Pope and Margaret S. Pope, and only where said Respondents and their Lawyer, John A. Putkey, were illegally prosecuting only one of several misjoindered multidefendants,

namely, Blanche David, without probable cause. Other glaring illegalities, none of the misjoindered multidefendants were apprised of the Pope, et al. v. David, et al. suit until September 15, 1970, approximately 96 days after the June 10, 1970 entry of the void default judgment was made separately against Blanche David, one of several alleged multidefendants.

DECREES SOUGHT TO BE REVIEWED AND DATES OF ENTRY

Judicial Orders of Court of Appeals, Ninth Circuit, affirming Dismissal Orders of U. S. District Court for the Northern District of California, entered March 15, 1976 (Appendix A).

QUESTIONS PRESENTED FOR REVIEW

1. Did Ninth Circuit err when it sanctioned State of California Courts' (Court of Appeal, First Appellate District and Superior Court of San Mateo County) deviations from the accepted and usual course of judicial proceeding long mandated by The Supreme Court Of The United States in its 1872 Decision in Frow v. De La Vega, supra, estoppeling lower courts from ever decreeing default judgment against one alleged multidefendant separately, who has allegedly defaulted, while the cause is still pending as to remaining multidefendants charged jointly with her? (The State of California Supreme Court denied her Petition for Hearing Appeal.)

a. Did such error result in substantive injuries to this Petitioner's Constitutionally-Guaranteed Rights, Legal Rights to Due Process of the Laws, to Equal Treatments of Laws, to Equal Protections of Laws, etc., as proclaimed in Amendments V and XIV of the Constitution of the United States of America?

2. Did Ninth Circuit err when it sanctioned State of California Courts' (Court of Appeal, First Appellate District and Superior Court of San Mateo County) departures from the accepted and usual course of judicial proceedings amplified by The Supreme Court of the United States in its Decision in Hovey v. Elliott, supra, prohibiting judicial officers from depriving any person of any Constitutionally-Guaranteed Rights to Due Process of the Laws, to Equal Treatments of the Laws, to Equal Protections of the Laws, etc., and from depriving defaulting multidefendant's substantive rights (A) to file Answer before full Court (B) to Rights of Confrontation, Cross-examinations, etc. (C) to file Motion to Vacate void Default Judgment of the Superior Court of San Mateo County, Redwood City, California, in Pope, et al. v. David, et al. Case #148707 and (D) Rights to Appear with Counsel Before a Fair Judge as permitted in Hazard v. Durant, 12 R.I. 100, to Defend Against all the false accusations of the accusers? (The State of California Supreme Court denied her Petition for Hearing Appeal.)

a. Did such error result in substantive injuries to this Petitioner's Constitutionally-Guaranteed Rights (Amds. V & XIV), Legal Rights to Due Process of the Laws,, etc?

3. Does The Supreme Court of the United States have Appellate Jurisdiction of Petitioner's Petition for Writ of Certiorari especially when conflicts existing between Ninth Circuit versus Second and Eighth Circuit Courts of Appeals have interfered with her rights to seek affirmative relief in her own behalf? (The Second & Eighth Circuits correctly follow the Supreme Court's Mandates as to the preferred practice for State or Federal Courts to withhold granting a default judgment against one

multidefendant in a multidefendants case until after the trial of the action on the merits against the remaining multidefendants has taken place, whereas, the Ninth Circuit opposes the preferred practices established by The Supreme Court in Frow v. De La Vega, supra, et al., but is adopted correctly by the Eighth Circuit in Roach v. Churchman. 431 F.2d 849, cited in Exquisite Form Indus.. Inc. v. Exquisite Fabrics of London. 373 F. Supp 403 (1974), and the Ninth Circuit ignored the Second Circuit's concern in Lunderville v. Allen, 366 F.2d 445 (1966) that in order to prevent possible miscarriage of justice the Second Circuit did afford an alleged defaulter an opportunity to defend his accuser's complaint on merits although issue had not been timely joined in court below and default judgment had been entered.)

4. Is the State of California Default Judgment Constitutionally Valid in view of the facts that one of the accusers deliberately under oath misrepresented truths to the Judge at the secret April 2, 1970 Trial where no lawyer was ever present to defend the accused, and where the accused, as well as the other remaining multidefendants and their lawyers were also excluded? (None of the multidefendants were apprised of the April 2, 1970 trial.)

CONSTITUTIONAL PROVISIONS WHICH CASE INVOLVES

Violations of 5th & 14th Amendments of the Constitution of the United States - Rights to Due Process of the Laws Before Monies (Property) are taken from Petitioner. OTHER INDIVIDUAL RIGHTS IN CONSTITUTION: Violations of Article III, Sections 1 & 2 thereof; THE BILL OF RIGHTS AMENDMENTS, I, IV. VI to XI. incl., and XIII; CCP Sections 389. 473, 537. Penal Code 118, etc.

FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

The Ninth Circuit's refusal to obey The Supreme Court of The United States Mandates.

The Ninth Circuit erred. It failed to exercise sound judicial discretion when it approved the State of California Superior Court's deviations from the accepted and usual course of judicial proceedings long mandated by this Court's 1872 Decision in Frow v. De La Vega, supra, which estoppels lower courts of the State and Federal Governments from ever decreeing default judgment against one alleged multidefendant separately, who alledgedly defaulted, while the cause was still pending or scheduled to be heard in the near future as to the remaining alleged multidefendants, charged jointly with alleged defaulter.

It was also abuse of judicial discretion not to have prevented her from suffering additional miscarriages of justice. It should have reversed the lower court's decrees, with costs and the cause remanded for further proceedings in conformity with the Opinions of The Supreme Court of the United States in Frow v. De La Vega, supra, et al., since the State of California Courts wilfully deprived the alleged defaulter, Blanche David, the Guarantees of the Federal Constitution, and Its Amendments, such as, an opportunity to defend against her accusers' complaint on the merits, where issue had not been joined in State of California Proceeding and default judgment had been entered without Due Process of the Laws, etc., without her knowledge, without the knowledge of the Homeowner, Her Brother, and in clear violations of The Supreme Court's 1872 Mandates as set forth in Frow v. De La Vega, supra, et al.

The Ninth Circuit knew that she already was the victim of the worst kinds of injustices because of the illegal conduct of her accusers from the very beginning in filing their unconstitutional lawsuit

against her without probable cause. Respondents Cecil E. Pope and Margaret S. Pope should have quickly withdrew it when she voluntarily appeared with a lawyer in the State of California Superior Court shortly after seeing for the first time on September 15, 1970 her pure name on their illegal papers.

Said error of the Ninth Circuit is not harmless. It is denying Blanche David in the Federal Courts her Constitutionally-Guaranteed Rights to Equal Treatments and Equal Protections of the Laws, and to DUE PROCESS OF THE LAWS, etc. to VACATE the State of California's infirm Default Judgment, etc. It was illegally-granted on April 2, 1970. recklessly against her, without probable cause, and is in open defiances of the proper procedures established by (a) The Supreme Court of The United States in Frow v. De La Vega, supra, et al.. of the DUE PROCESS OF THE LAWS, etc. Guarantees firmly-established in Hovey v. Elliott, supra, et al., (b) The Federal Constitution, and Its Amendments, etc., and (c) CCP Sections 389, 587 State Laws.

It was illegally-entered on June 10, 1970 approximately 96 days before any of the alleged multidefendants were ever apprised or were ever served with process in Pope, et al. v. David, et al. State of California Superior Court, San Mateo County, Redwood City, California Case #148707. The service date was September 15, 1970, which is the first time Blanche David became aware of Pope, et al. v. David, et al. illegal suit. (Appendices B to E, inclusively).

Shortly thereafter, the State of California Superior Court Judge gave the Insurer's Lawyer of the remaining alleged multidefendants charged jointly with Blanche David, extensions of time to File Answer, Take Depositions of Respondents Cecil E. Pope and Margaret S. Pope, Their Builder; to Engage Services of an Engineer and consult with

City Engineers of City of Burlingame, California, to subpoena one of the indispensable parties, namely, the Builder of the residences located on the improperly steeply-graded slopes at 2822 and 2826 Tiburon Way, Burlingame, California, the subjects of Case #148707. At that late date, Respondents Cecil E. Pope and Margaret S. Pope still lacked an Engineer's Report to support their allegations, as they never engaged the services of Soils, Water, Civil Engineers, etc. With respect to the homeowners in their area, Respondents Cecil E. Pope and Margaret S. Pope refused to join with the homeowners who had engaged the services of several expert Engineers to survey the area and locate the source prior to filing their Class Actions against the real indispensable parties legally liable for the damages, etc. 1/

With respect to the State of California Superior Court Judge granting the Insurer's Lawyer additional time that is a contrasting factor to the continuous wilful malicious prosecutions of the alleged defaulter, Blanche David, without probable cause, without judicial trial, etc. (Appendix E versus Appendix F).

1/During the course of those shallow Court Sessions, which lingered on for four years (1970-74), the goals of (1) the Insurers of Properties located at 2822 and 2826 Tiburon Way, the subjects of Case #148707 (2) their Lawyers (3) Cecil E. Pope, Margaret S. Pope, and Their Lawyer, John A. Putkey, were to collect the monies from Blanche David; shelter Cecil E. Pope, Margaret S. Pope, John A. Putkey, et al. from Public Trial and her brother's countersuit; save the Insurers of both Properties from expending funds on such a Public Trial, and lastly to whitewash out of the Court System her brother's countersuit against his accusers for their wilful illegal conduct; for wilfully damaging his Peace, Health, Happiness, Privacy, Property,

his Rights, as Property Owner, to be informed before any person threatens lawsuits against his insured property, etc. by secretly and wilfully destroying his sister with the aid of the State of California Superior Court who knew that it was acting in contempts of the Mandates of the Federal Constitution, and Its Amendments, etc., of the Mandates set forth in Frow v. De La Vega, supra, et al. It also knew that it was acting recklessly in awarding the sum of $5,000 to Respondents Cecil E. Pope and Margaret S. Pope for alleged property damage to their insured parcel without inquiring (a) what type of drainage system, if any, they have on their insured property (b) Water Table Readings (c) whether they engaged the services of an Engineer to try to discover the source of their alleged problem (d) why did they sue a lady for the purposes of obtaining such a personal device to be installed on their insured land (e) Easement "Laws", etc.

With respect to the outcome of those Court Sessions, the State of California Superior Court granted the Insurers' Lawyers "Motions to Extend the Five-Year Statute of Limitations of the Pope. et al. v. David, et al. suit #148707"from October 21, 1974 to October 22, 1975. Then a surprise move by her brother's Insurer and its Lawyer; they withdrew from the case. Consequently, her brother was forced either to abandon his Countersuit or to seek the services of a Private Lawyer to protect him. With a Private Lawyer representing her brother, the climate changed. Appendix G shows the results that the Insurers of Cecil E. Pope and Margaret S. Pope and the Builder had to make restitutions to her brother instead of the reverse.

In view of those positive actions by the State of California Superior Court Judge in behalf of the remaining alleged multidefendants charged jointly with the alleged defaulter, Blanche David, the State Judge should have simultaneously vacated the Default Judgment illegally-decreed against a misjoindered multidefendant, as well as well as the fraudulent lawsuit of Pope, et al. v. David, et al. should have been immediately dismissed in its entirety. Furthermore, the void Default Judgment should have never been sustained by the State of California Court of Appeal, First Appellate District, on February 13, 1973 against the misjoindered multidefendant. However, it should have been reviewed on November 8, 1973 or shortly thereafter by the United States District Court For The Northern District of California Judge, who had full authority to do so. It also should have never been rubber-stamped as valid by the Ninth Circuit's infirm Order filed on March 15, 1976 in view of the existences of the 1872 Mandates of The Supreme Court in Frow v. De La Vega case, supra, prohibiting such unlawful decreeing of Default Judgment, in Hughes Tool Co. v. TWA, Inc., supra, and in view of it violating the Guarantees of the Federal Constitution and Its Amendments, etc., and Petitioner's Rights to remove all the miscarriages from her, the misjoindered multidefendant.

Those foregoing illegal actions and intentional omissions reveal that the State Judges and Respondents involved in this case had acted illegally at all stages of their illegal proceedings against Blanche David, the misjoindered multidefendant, and wilfully deprived her of her Federally-Protected Rights, etc. in the State of California State Courts, and that the Federal Judges intentionally denied her her Federally-Protected Rights, etc. giving her the revolving-door treatments instead of remanding the cause for further proceedings below.

Every judicial officer and Respondents involved in this case know the 1872 Supreme Court of the United States of America Commands that where Default is entered against only one of several multidefendants, the preferred practice is for the Court to withhold granting of a Default Judgment until the Trial of the action on the merits against the remaining multidefendants takes place. Thus, if plaintiff loses on the merits, the Trial Court should then dismiss the complaint against both defaulting and nondefaulting defendants.

It is important to report that in the year 1975 Respondents Cecil E. Pope and Margaret S. Pope, Plaintiffs in State of California Superior Court Case #143707 and their Builder (who in the year 1959 also constructed a series of other dwellings located on the defectively-engineered Tiburon Way hillside in Burlingame, California) bought their ways out of the illegal lawsuit filed against several multidefendants, who were misjoindered and belatedly served by agents of Cecil E. Pope, et al. on September 15, 1970 (ninety-six (96) days after the illegal entry of the void Default Judgment against an alleged defaulter by the State of California Superior Court Judge). Copies of the still uncashed checks made payable to one of several multidefendants of that unconstitutional lawsuit are available in the Appendix **G** of this Petition as evidence of that fact.

Those payments also show that in the year 1975, approximately five (5) years later, Blanche David was again unlawfully discriminated against by the State of California Superior Court Judge, who quietly terminated the illegal lawsuit against the remaining multidefendants whereas he neglected to order Respondents Cecil E. Pope and Margaret S. Pope to also make restitutions to multidefendant Blanche David for wilfully causing the machinery of the State of California Superior Court to act recklessly against her, to falsely prosecute and

to wilfully deprive her of all her Constitutionally-Guaranteed Rights, Privileges, Immunities, etc., her Reputation, her Peace, her monies, etc. in a State Court absolutely lacking all jurisdictions of person, subject matter and power to enter Default Judgment against a multi-defendant separately, without probable cause, without judicial trial, and in open defiances of the Mandates clearly cited in Frow v. De La Vega, supra, by all The Supreme Court Justices of The Supreme Court of The United States in the year 1872.

It is also relevant to state that in the year 1975 Respondent State of California Superior Court continued to disregard/defy those Federally-Protected Fundamental Rights of Blanche David, which rights do entitle her to Due Process of the Laws, Equal Protections and Equal Treatments of the Laws, etc. at all stages of any judicial proceedings, to the protective Commands specifically cited in the Precedented Cases of Frow v. De La Vega, supra, Hovey v. Elliott, supra, et al., and to the recent 1973 Supreme Court Mandates overturning the lower Courts' $137.6 million Default Judgment asserted against the late Howard Hughes, the sole owner of Hughes Tool Co., in Hughes Tool Co. v. Trans World Airlines, Inc., supra. It also neglected in the year 1975 to revoke its void Default Judgment which it recklessly and wrongfully-imposed against Blanche David on April 2, 1970 in open defiance of the Frow v. De La Vega case. It further neglected in 1975 to reverse its past intentional wrongs, unfairnesses, etc. previously committed against her before it finally permitted Cecil E. Pope and Margaret S. Pope to officially buy their ways out of their illegal lawsuit in the year 1975. As a matter of fact, in the year 1969, each State of California Judicial Officer involved in this case, together with Respondents Cecil E. Pope, et al. knowingly transgressed the simple requirements of CCP 389

and/or Rule 19, F.R.P. requirements, as to joinders of indispensable parties 2/ before any Judgment can be decreed by any judge against any alleged defaulter in any Court located in the State of Calif. In the year 1970 they also knew that Lawyer John A. Putkey's Clients, Cecil E. Pope and Margaret S. Pope ruthlessly trespassed on the rights of her brother, the sole owner of 2326 Tiburon Way, Burlingame, Ca., when without probable cause they wilfully sued Blanche David, et al. in a State Court lacking jurisdictions of person, subject matter and power to decree default judgment against the alleged defaulter, separately. She had no capacity to be sued. (Appendices H to M). Ex Parte Ayers, 123 U.S 443, 8 S.Ct. 164, 31 L.Ed 216; Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

By intentionally violating all those simple Rules of Procedures, the American Bar Assocation Code of Professional Responsibility, Federal Constitution, and Its Amendments, etc., Respondents caused and continued the substantive injuries to the Legal Rights, Constitutionally-Guaranteed Rights, etc. of Petitioner Blanche David at every stage of every proceedings. They systematically, successfully and intentionally obstructed the due

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2/They knew that the indispensable parties legally liable to be sued were the land developers, their engineers, builders, architects, contractors, et al., City of Burlingame & State of California Engineers, et al., and not Blanche David, et al. However, said indispensable parties were never ordered joined by the State of California Superior Court Judge as multidefendants in the illegal lawsuit #148707 and the Federal Judicial Officers who had jurisdictions of Petitioner's 1973 Petition never took judicial notice of that deficiency which by itself voided the fatally-defective Judgment Decree, etc. See Covarrubias v. James (1971) 21 CA 3d 129, 98 Cal Rptr 257. (Appendices H and M).

course of justice, which she legally invoked to vacate their illegal acts and illegal actions when she received their illegal papers on September 15, 1970 from her brother.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT - Rule 19

State of California Superior Court, San Mateo County, Redwood City, California knew it lacked authority to decree the Default Judgment against Blanche David or any person. It knew or should have known that it transgressed the Constitutional Laws laid down by The Supreme Court of the United States in Frow v. De La Vega, supra; in Hovey v. Elliott, supra; laid down by The Federal Constitution, and Its Amendments, and in CCP Section 389, etc. By so doing it wilfully deprived Blanche David of all her Federally-Protected Rights, Privileges, Immunities, etc., Right to Presumption of Innocence, etc. The Court records show that the Superior Court Judge in Case #148707 (Pope, et al. v. David, et al.) from October 22, 1969 until November 29, 1970, inclusively, conducted illegal proceedings with only Plaintiffs Cecil E. Pope, et al. and their Lawyer, John A. Putkey, as participants. No person made a diligent effort to locate any of the missing multidefendants and the Court itself never mailed Notices to the alleged defendants. Cecil E. Pope, et al. knew where Petitioner is employed. In fact it was simple they could have rang the doorbell at 2826 Tiburon Way, Burlingame, California, and spoke to her brother or leave a note in his outside mail box.

Petitioner Blanche David was not apprised of the fraudulent lawsuit prior to September 15, 1970. On that date, the other multidefendants received the Superior Court Case #148707 papers and transmitted them to this Petitioner. If the Sheriff had replied to her March 1970 inquiry, to her brother's inquiry, and if the Judge had answered her July 18, 1970 Letter,

Blanche David would have immediately contacted her lawyer, who was representing her in the same Court in the matter of her personal injuries, to look into the culpable Case #143707. Consequently, their omissions deprived Blanche David of her rights to have competent counsel defend her. She certainly should not have been punished for their wilful inactions and/or extrinsic frauds. (Appendix J).

With respect to activities illegally taking place in the State of California Superior Court without her knowledge; without due process of the laws, etc., and in violations of the Federal Constitution, and Its Amendments, the Superior Court Judge issued a Default on November 26, 1969; on April 2, 1970, he illegally decreed the Default Judgment and on June 10, 1970 entered it against Blanche David, separately, while the cause was still pending as to the remaining alleged multidefendants charged jointly with her. Another obvious defect regarding the illegal issuance of the void Default Judgment is the fact that the indispensable parties legally liable to be sued were never ordered by the Judge joindered as multidefendants in Case #148707 Complaint. Without such a joinder, a judgment is void and cannot be sustained by a Court of Appeal as valid. See Irwin v. City of Manhattan Beach, 227 CA 2d 635 (1964). (Appendices C to E & H to J).

Still another fatality is the fact that none of the multidefendants were served with process until September 15, 1970, approximately 96 days after the June 10, 1970 entry of the void Default Judgment had been made against Blanche David, only one of several misjoindered multidefendants. (Appendices E, I, K & L).

In fact the accusers' vague Complaint never was amended to remove Blanche David, the misjoindered multidefendant and to include in her place the real indispensable parties as prescribed in CCP Section 389 or as followed in Federal Courts under Rule 19, F.R.P. The indispensable parties were the land de-

velopers, their engineers, contractors, et al., who were responsible for improperly-engineering the steep slopes, etc., upon which the same builder constructed residences known as 2822 and 2826 Tiburon Way thereupon. One of which, namely, 2826 Tiburon Way was unlawfully subjected to two unlawful suits wilfully instigated by Respondents Cecil E. Pope, et al., first against Blanche David, et al., and the second suit against her brother, et al., approximately eleven months thereafter. (Appendices B & E, and H to M).

The Superior Court records will show that Blanche David and her short-term lawyer were the first to appear in Court on November 30, 1970 to defend against the perjurers; to file Motions to Vacate its void April 2, 1970 illegally-decreed Default Judgment against her; to file Answer, etc. The records also show that the Superior Court intentionally denied her Motions, etc. Consequently, it again deprived her of all her Federally-Protected Rights to Due Course of Justice; to Due Process of the Laws, to Equal Treatments & Equal Protections of the Laws, etc. in any Court Proceedings conducted in the United States of America. (Appendices I, J, M & N).

Instead of tongue-lashing Blanche David for no reason and impeding justice itself in November 1970, the Court itself should have prevented further miscarriages of justice. The Court, together with Respondents Cecil E. Pope, Margaret S. Pope, and Their Lawyer, John A. Putkey, were fully aware of their wilful procedural abuses and misuses, wilfully committed against Public Justice and against the misjoindered multidefendant Blanche David and her brother's insured property, without her knowledge and without his knowledge. (App. I, J, M & N).

Under those circumstances, the Court was under obligation to quickly dismiss Cecil E. Pope's and

Margaret S. Pope's two extrinsic frauds suits in their entireties. It should have never overlooked the facts that its own wilful misconducts, together with those of the cruel instigators and Their Lawyer, John A. Putkey, in bringing such extrinsic frauds suits into a Court of Law, are forbidden in the U. S. A. (Appendices B, F, I to L and N).

Appendix O shows that the State of Calif. Ct. of Appeal, First Appellate District, on Feb. 13, 1973, illegally sustained 1 the lower Court's illegal decreeing of the Default Judgment, etc. against a misjoindered multidefendant Blanche David and 2 slandering the Title of the insured real estate property owned solely by her brother. (See Appendix K). /He could have lost his property, etc. all due to those two wilful extrinsic frauds suits, and by said Court of Appeal's intentional failures to set aside the void Default Judgment under CCP 389, 473 or 587. 3/ (Appendix I)./. Said Court itself knew that it should have ordered the lower Court to dismiss Complaint #148707 in its entirety. Appendix A shows that the State of Calif. Supreme Court denied her Petition for Hearing of the matter in April 1973. The Sovereign State knows that its Courts wilfully practiced extrinsic frauds on misjoindered multidefendant Blanche David at every stage and both the Clerk's & Reporter's Transcripts confirm that statement. The Sovereign State knows it is misusing the Eleventh Amd. Privilege to conceal those wrongs, etc.

In view of the facts that the Sovereign State and the U. S. Courts in San Francisco have jointly sustained the State Judiciary Departments' illegal acts and actions wilfully committed against misjoindered multidefendant Blanche David, Petitioner Blanche David in Propria Persona appeals to this Court for:

1. a Review of her Complaints:

(a) regarding the improprieties of illegally-

3/Re: CCP 389, see n. 2 on P. 15 herein; Re: CCP 473, see Appendices I to L, inclus; Re: CCP 587, see Appendix I, p. I-2, Clerk's & Reporter's Transcripts rebut the Court of Appeal regarding CCP 587.

decreeing the April 2, 1970 Default Judgment against her by a State of California Superior Court contrary to the full Rules laid down in the year 1872 by The Supreme Court of the United States in Frow v. De La Vega, supra; said illegal decreeing took place in a State of California Court without jurisdictions of person, subject, without powers to decree and without due process of the laws, etc. accorded to the accused, namely, Blanche David

2. a Ruling:

(a) Addressed to All Courts in the United States and specifically to the Courts located in the State of California, confirming that all the Mandates of The Supreme Court of the United States in Frow v. De La Vega, supra, must be fairly administered, uniformly followed and evenly applied to any person, etc., therefore the illegally-decreed default judgment wilfully imposed against misjoindered multidefendant Blanche David must be immediately removed; that the State of California Judge who illegally issued it aggravated her substantive injuries; that the State of California Judge had removed his mantle of authority and immunity privileges when he first contravened said Mandates in April 1970, and thereafter by himself, by the State's higher Tribunal, and by the absolute failures of the Attorney General of the State of California to recognize that the State of California became personally involved and thus advocated such State-designated cruelties to originate in its Courts of Law, and that it was no longer just personal wrongs of Respondents Cecil E. Pope, Margaret S. Pope, and Their Lawyer, John A. Putkey, and Their Insurers of Contingent Liabilities and Their Lawyers Duane E. Clapp, Jr., and Richard B. Melbye which injured the substantive rights

of misjoindered multidefendant Blanche David, but that it became a State wrong at the time of its illegal decreeing of the Default Judgment against the misjoindered multidefendant Blanche David, and the subsequent unconstitutional acts, actions, and inactions of all Respondent named herein also compounded her substantive injuries; that the Ninth Circuit did err in quietly affirming the lower Court's infirm Dismissal Orders and that Petitioner's Cause of Action is therefore remanded for further proceedings to take place in the U. S. District For The Northern District of California since she could not obviously obtain Due Process of the Laws, etc., when she pleaded for all those Rights in all of the State of California Courts which wilfully rejected her

and 3. to Repudiate the Court of Appeals' erroneous conclusions:

(a) that Appellant taking the position she had not been properly served and did not appear in Pope action for that reason

(b) that the U. S. District Court For The Northern District of California is without jurisdiction to review the State of California Superior Court's illegally-decreed Default Judgment because said State Court's April 2, 1970 Default Judgment must meet the $10,000 Federal jurisdictional minimum. (Appendix A), AND

(c) that the granting of the April 2, 1970 Default Judgment and retention thereof by the State of California Courts (Superior Court and Court of Appeal, First Appellate District) against Blanche David are valid.

To permit the Ninth Circuit's Decision to stand is by itself to condone these wilful deprivations of

Blanche David's Federally-Protected Rights, etc; abuses of her Civil Rights, etc; misuses/abuses of her Constitutionally-Guaranteed Rights to Due Process, Equal Treatments & Equal Protections of the Laws; misuse of power against her, without her knowledge, etc. by the judicial officers (judges and lawyers); perjuries, extrinsic frauds, etc., while they were acting illegally under "Colors of Laws" in the State of California Courts against Blanche David, without probable cause, whereas such crimes/misconducts are severely condemned by Society and by Courts of Laws, if they learn that any persons outside the Court conspire to do such wrongs or if they carried out those wrongs, such as happened to this Petitioner. If the Ninth Circuit's Decision is allowed to exist, it will encourage future improper presentations by other lawyers and their clients to any Court of Laws.

THIS COURT SHOULD REVIEW THIS CASE IN ITS ENTIRETY AND EXERCISE ITS POWER OF SUPERVISION OVER FEDERAL AND STATE JUDGES, WHO RECKLESSLY PERMIT LAWYERS TO SUE ANY PERSON WHO HAS NO CAPACITY TO BE SUED, TO BE WILFULLY PROSECUTED AND CRUELLY PUNISHED WITHOUT PROBABLE CAUSE IN VIOLATIONS OF THE FEDERAL CONSTITUTION & ITS AMENDMENTS AND FEDERAL REGULATIONS, ETC., AND IN VIOLATIONS OF THE MANDATES OF THE SUPREME COURT OF THE UNITED STATES CONCERNING (a) WITHOLDING GRANTING DEFAULT JUDGMENT BY PLACING THE "ALLEGED" DEFAULTER IN AN "INACTIVE" ROLE PENDING OUTCOME OF TRIAL ON MERITS AS TO REMAINING MULTIDEFENDANTS, AND THE SETTING ASIDE OF "VOID" DEFAULT JUDGMENTS, AND IN VIOLATIONS OF (b) GRANTING THE "BILL OF RIGHTS" GUARANTEES, ETC.

A RULING BY THIS COURT IS ESSENTIAL TO REVERSE THE DANGEROUS PRECEDENTS SET IN POPE, ET AL. v. DAVID, ET AL. SUPERIOR COURT CASE #148707, ETC., AND TO FURTHER PREVENT RECURRENCES OF WILFUL VIOLATIONS OF DUE PROCESS OF THE LAWS, ETC. OF ILLEGAL ENTRIES OF DEFAULT JUDGMENTS BY COURTS AGAINST ANY PERSON OR ANY ONE OF SEVERAL ALLEGED MULTIDEFENDANTS

WHO IS ABSENT AND/OR MISSING FROM THE PROCEEDING.

A RULING BY THIS COURT IS ESSENTIAL TO GIVE THE STATE OF CALIFORNIA AND ITS JUDGES AND LAWYERS, AND FEDERAL JUDGES, ET AL. LOCATED IN CALIFORNIA MUCH NEEDED DIRECTION IN THE GRANTING OF DEFAULT JUDGMENT AND TO GIVE THE ACCUSED THE NEEDED PROTECTIONS IN SUCH CASES.

Commencing in November 1970, Blanche David and her short-term lawyer quickly sought relief in State Superior Court, San Mateo County, Redwood City, Ca. from an illegal suit of Cecil E. Pope, et al. v. Blanche David, et al., and from the Court's illegal granting of its Default Judgment; in 1971 in the State of California Court of Appeal, First Appellate District, her lawyer of her choice, filed an extraordinary Brief to rescind the void Default Judgment, etc., and in 1973, again he filed another brilliant Brief in the State Supreme Court of California to hear her Appeal, and provide justice to her. (With respect to the Insurer of the dwelling in which Petitioner resides, it restricted legal services to only two attempts. Consequently, Blanche David was harmed by those weak efforts and abandonments. She then expended her personal funds to pay for the services of a private lawyer of her choice to prepare a series of appeals, etc. which were quickly jetted out of the system. Of course her monies finally ran out. Despite those hindrances, and without the benefit of expert legal counsel, she continued in Propria Persona to petition for remedy and to sue the offenders in the Federal Courts.) Also, while acting in Propria Persona, she still sought relief from the miscarriages of justices, firstly, in the U. S. District Court for the N. D. of California on November 8, 1973 when she petitioned that Court (who had full jursidictions of person and subject matter) to Review a Judgment of California State Court When California State Court Lacked Jurisdiction of Subject Matter and Person; Entered Judgment It Had No Power To Enter, and Where

void April 2, 1970 Default Judgment was Obtained Without Due Process, etc. Its entry date was on June 10, 1970. (See Custom Leasing v. Gardner, 307 F.Supp 161 (1969)), and finally in 1975-76, inclusively, in the U. S. Court of Appeals For The Ninth Circuit from the infirm Dismissal Orders of the lower Court and discretionary errors of the District Judge who failed to give notice to the U. S. Attorney General in accord with Section 2403, 28 U.S.C.A. (whenever any complainant claims wilful deprivations of Constitutionally-Guaranteed Rights to Due Process, Equal Treatments and Protections of Laws, etc. have happened, and/or if infringements of specific guarantees of "Bill of Rights" are involved).

All Respondents especially the judicial officers knew that the infirm Default Judgment violated the Precepts laid down in Frow v. De La Vega, supra; in Hovey v. Elliott, supra; in CCP Sections 389 and 587; in the Federal Constitution and Its applicable Amendments, and that Respondents for no probable cause simultaneously, knowingly, continuously and wilfully deprived Blanche David of all her Constitutionally-Guaranteed Rights, Privileges, Immunities, etc. to Due Process of the Laws, Presumption of Innocence, to Public Trial, etc., before she acquired knowledge of Complaint #148707. See Coffin v. U.S., 156 U.S. 432, 453.

Briefly stated, Respondents Cecil E. Pope and Margaret S. Pope knew that they should have paid their private builder in 1959 to install their drainage system on their insured property if they wanted a device similar to the device the same builder installed for her brother in 1959 in accordance with the Codes of the City of Burlingame. They knew that they had no rights to extort monies from Blanche David in 1970 to force her to install for them in 1973, and that their suit was evil.

WHEREFORE, this Petitioner again in Propria

Persona, prays that this Petition be granted and a Writ of Certiorari issue to review the conclusions of the Court of Appeals For The Ninth Circuit in view of the aforementioned injustices which have enslaved her since September 15, 1970 the date papers concerning Pope, et al. v. David, et al., Superior Court Case #148707 were served for the first time at 2826 Tiburon Way, Burlingame, Calif., approximately 96 days after the illegal entry on June 10, 1970 of the void April 2, 1970 Default Judgment against her as one of several misjoindered multidefendants and before a judicial Trial or Jury Trial had ever been ordered on the merits of the case for Blanche David and/or for any of the remaining misjoindered multidefendants, and where Respondents Cecil E. Pope, Margaret S. Pope, and Their Lawyer, John A. Putkey, intentionally misjoindered her, never joinder the "real" indispensable parties to their Complaint, never produced proofs, etc., and where under oath perjuries/extrinsic frauds were wilfully committed against this missing Petitioner. (Appendices E to N, inclus.).

Petitioner told the truth. She did not open the bolted door at 2826 Tiburon Way, Burlingame, Calif. on the winter night of November 3, 1969 to the stranger; she did not know why a stranger was personally trespassing on private property at that late hour (past 9 P.M.) and she did not want to risk her security to question the stranger; she did not build the dwelling belonging to Cecil E. Pope, et al., she did not damage their insured parcel, etc., and that she is not the owner of the property belonging solely to the disabled war veteran, which Respondents Cecil E. Pope, et al. intentionally jeopardized and slandered the true owner's title of ownership, etc.[1]/ (Appendix K). Petitioner admits that she was eventually served on September 15, 1970 by her brother. Thus at that specific time, she acknowledges that she became the misjoindered multidefendant to Cecil E. Pope, et al. secret suit by reason of belated service. Conse-

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[1]/Relevant to those material facts is that her

quently, for the first time on November 30, 1970 the Superior Court in Redwood City, California, may have acquired jurisdiction of the misjoindered multidefendant Blanche David, who had no capacity to be sued by Respondents Cecil E. Pope, Margaret S. Pope, and Their Lawyer, John A. Putkey. The Court Records (Appendix N) show that on November 30, 1970 Blanche David voluntarily appeared with her Brother's Insurer's Lawyer to Vacate the illegally-decreed Default Judgment, which by itself violated The

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brother, the sole and true owner, who was not joindered by Cecil E. Pope, et al., in the year 1969, as a party defendant, would have been immediately involved, if his sister had been served. He would have engaged the services of licensed engineers to probe the allegations, seek legal advice, notify his insurers, and would have personally appeared in any Court with his sister, his lawyers, expert witnesses, proofs, his insurers' lawyers, et al., to defend his innocent sister, his insured real estate, his Title of Ownership, etc., if his sister had been served. His lawyer and engineers, et al. would have been in a position to advise the Judge that neighbors of Cecil E. Pope, et al. had recently filed legitimate lawsuits in 1969 in the same Court against the land developers, their engineers, et al., for improperly engineering the slopes, etc. (Appendix H). His lawyers would have moved to quash the Summons, Their Fraudulent Suit, all illegally-decreed Court Orders, etc. issued against his sister, and/or countersue the Accusers, together with the "real" indispensable parties (the land developers, et al.) legally liable for the underground, surface defects, etc. Respondents Cecil E. Pope, et al., and Their Lawyers, et al. put Petitioner and her brother through tortures and unnecessary and extraordinary expenses, traumas, ridicules, etc. (Appendices H and M).

Supreme Court of the United States Mandates in Frow v. De La Vega, supra; Hovey v. Elliott, supra; Pennoyer v. Neff, 95 U.S. 714 (Page 733 thereof); U. S. v. Throckmorton (1878), 98 U.S. 61, 25 L. Ed. 93, the Federal Constitution and Its Amendments, and which had wilfully deprived her of her Federally-Protected Guarantees to Due Process of the Laws, etc. (Appendix J).

Irregardless of conflicts as to service; absence or presence of the misjoindered multidefendant(s); nonjoinders of "real" indispensable parties; false and misleading material testimony/extrinsic frauds, etc., this Petitioner contends that she was entitled to receive Due Process of the Laws, etc., and that the State of California Superior Court, San Mateo County, Redwood City, California, on November 30, 1970 was under strict obligations to do so, and should have performed essentially its Constitutional Duties to quickly eliminate its grave judicial errors of noncompliances with the Laws of the Land, etc., Rules of State Courts, etc., instead of perpetuating, complicating and concealing its crimes at the expense of Blanche David, and maligning her (The Victim) for no reason.

Simple glances by the Superior Court Judge at both the Caption and the Body of the Complaint #148707 originally drafted and filed by Lawyer John A. Putkey showed that there were more than one multidefendant (Appendix B) and that it was void on its face. Therefore, the Judge's Constitutional Duties consisted of Vacating the illegally-decreed April 2, 1970 void Default Judgment (A) because of its repugnancies to and deviations from The Supreme Court of the United States' Procedural Rules clearly expressed in the year 1872 in Frow v. De La Vega, supra, et al., (B) because of its procurement was by extrinsic frauds wilfully practiced on Blanche David without her knowledge by Respondents Cecil E. Pope, et al., and Their Agent, the alleged Server and the State of California Deputy Sheriff, (such

extrinsic frauds alone made the Default Judgment void, namely, that the Deputy Sheriff and the alleged Process Server failed to perform their simple duties, prevented Blanche David from appearing in Court, see U. S. v. Throckmorton, supra), (C) because of its obvious contempts to the guarantees of the Federal Constitution and Its Amendments, etc., and its obvious destructions to Blanche David, her substantive rights to Due Process of the Laws, Equal Protections and Equal Treatments thereof, etc., and (D) because of Lawyer John A. Putkey's negligences to employ the services of an engineer and a title searcher. Every person in the Courtroom on November 30, 1970 heard that he had failed in the year 1969 to first examine the Title of Ownership of 2826 Tiburon Way, Burlingame, California and ascertain who the true owner was, to wit: her Brother before he drafted his illegal Complaint for his two Clients. Instead he wrongfully sued a nonowner and his Clients, Cecil E. Pope and Margaret S. Pope, had falsely accused Blanche David of committing criminal acts against their insured property. Lawyer John A. Putkey knew that if he had exercised care and not violate the Rules of the American Bar Association Code of Professional Responsibility, he would not have misjoindered Blanche David, as one of several multi-defendants in his Clients' illegal suit, in October 1969, and intentionally caused Blanche David to be maliciously prosecuted by a State of California Judge who lacked authority to prosecute her as no probable cause existed against her. (Appendices H-I and K). The Judge's conduct by itself also violated the Federal Constitution and Its Amendments.

The failure of the State of California Court on November 30, 1970 to Vacate its illegally-issued Default Judgment by itself aggravated Blanche David's substantive injuries and also offended every relevant Mandate of The Supreme Court of the United States commencing with Frow v. De La Vega; Hovey v. Elliott; Pennoyer v. Neff; U. S. v. Throckmorton;

Ex Parte Ayers; Ex Parte Young, supra, et al.

The State of California Judges' reprehensible conduct in noncompliances with the Laws of the Land, Court Rules, and The Supreme Court of the United States Mandates, alone caused her and compelled her to file in all State and Federal Courts located in San Francisco, California, multiplicities of lawsuits, legal pleadings, etc. in hopes that those knowledgeable justices would reverse all those wrongs instead of intentionally ignoring them and the Constitutional Rights of the injured Blanche David.

Reprehensible conduct of this nature, if not corrected, only stimulates crimes to be continually committed within the Halls of Justice, by the unscrupulous against other innocent persons. They also cause the victim to suffer mental breakdowns, illnesses, injuries, bankruptcies, aggravate their illness, cause premature deaths, etc.

Without a question of doubt said Court's inabilities to comply with all the Supreme Laws of the Land and specifically with the 1872 Decision of The Supreme Court of the United States in Frow v. De La Vega, supra, are responsible for originating and retaining the cruel "slave" status of Petitioner Blanche David in violations of Article III, Sections 1 and 2 thereof, and of Amendments XIII and XIV of the Constitution of the United States. Those judicial errors have also aggravated Petitioner's substantive injuries which were wilfully caused (1) by Respondents Cecil E. Pope and Margaret S. Pope's secret suit filed by Their Lawyer, John A. Putkey, on October 22, 1969 against misjoindered Blanche David, et al., without probable cause, (2) by Respondent Cecil E. Pope intentionally giving false and misleading material testimony to Lawyer John A. Putkey and to the State of California Superior Court Judge on April 2, 1970, such false testimony is extrinsic fraud and was responsible for the illegal

granting of the Default Judgment on April 2, 1970 and subsequently the illegally-entry thereof on June 10, 1970 against one of the misjoindered multi-defendants separately (Appendices H to M), and (3) by Respondents Cecil E. Pope and Margaret S. Pope and Their Insurers of Contingent Liabilities, and The Lawyers of the Insurers who recklessly defended the retaining of the unlawful suit, unlawful Default Judgment and other illegal decrees permanently against misjoindered multidefendant Blanche David, one of several misjoindered multidefendants in spite of aforementioned material facts and of the facts and personal knowledge that the action on the merits as to remaining misjoindered multidefendants charged jointly with her was still pending and was quietly closed in the year 1975 (Appendices B to K, inclu-L and M). Realistically, they knew that Cecil E. Pope and Margaret S. Pope should have paid their personal funds to their private builder in 1959 to install on their insured property a drainage device and not file a suit against a lady in 1969 to force her to pay for such a personal device.

For unknown reason(s) both the U. S. Court of Appeals (9th Circ.) and District Court neglected to comply with the Mandates of Sec. 2403, Title 28, to give General Notice to the Attorney General of the U. S., and leave it to him to decide to intervene since Petitioner complained to the Federal Courts that State of California Judges and Judicial Officers of State of California wilfully deprived her of the Equal Treatments, of Equal Protections and of Due Process of the Laws in violations of the Guarantees of the Federal and State of California Constitutions, Their Amendments, the Constitutional and Federal Laws of the United States, and the Laws of the State of California and Rules of Its Courts when the State of California Superior Court Judge issued his illegal sanctions <u>contrary</u> to the Laws Mandated by The Supreme Court of the United States in 1872 as to the withholding of granting Default Judgment against an alleged defaulter separately.

and as to the requirements of CCP 389 relating to the joinders of indispensable parties, while the cause was not proceeding against the other misjoindered multidefendants.

Petitioner told the District Court Judge that the State of California Superior Court acted entirely without jurisdictions and without cover of authority and recklessly in violations of laws when it illegally-decreed sanctions (default judgment), etc. against her without Due Process of the Laws, etc., then when it wilfully refused to afford to her the Constitutional Guaranties to Due Process within its Court to Impeach its illegally-decreed void Default Judgment, etc., which were secretly obtained by Cecil E. Pope, et al., and Their Agents perpetrating extrinsic frauds against her and against the real estate property solely owned by her brother, without probable cause, without Due Process of the Laws, etc; that the State of Calif. Superior Court by itself wilfully deprived her of all her substantive rights, and that it also wilfully deprived the sole owner of the real estate property of his property right, "the right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man * * *." 1/, (Appendix I), and his safeguarded rights under Amds. V & XIV, Sec. 1 thereof, to Due Process of the Laws before any Court could levy such a void Default Judgment Decree, etc. against his property without Notice to him, and when she also complained to the District Judge that the Court of Appeals of the State of California, First Appellate District, illegally authorized the illegal sanctions of the lower State

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1/Source: Selected Essays on Constitutional Law; Published by The Association of American Law Schools, Vol 1, P. 103 Justice Paterson's charge to jury in Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310 (1795).

Court, and illegal acts and actions of the perjurers in violations of CCP Sec. 389, 473, 587. Penal Code Sec.118, etc., but the District Judge obviously ignored her substantive injuries. (Appendix O).

Petitioner also advised the District Judge that she has a right of action against the State of California for its dominant role in authorizing its judges to do illegal acts, such as the illegal decreeing of the default judgment against an alleged defaulter and the illegal retaining thereof against a misjoindered multidefendant, an innocent person, without due process, without probable cause, etc., and that since those illegal acts and actions directly emanated from its Judiciary Departments of the Government of the State of California during the times it was acting illegally in the Pope, et al. v. David, et al. suits, Blanche David had correctly petitioned the proper Court on November 8, 1973 to Review Her Petition. Therefore it was the duty of the District Judge to schedule the suit for full proceeding in his Court or assign it to another Judge.

The failures of both Federal Courts to give General Notice to the Attorney General of the U. S. did frustrate Petitioner's right to have him examine her November 8, 1973 Petition in order to learn whether she was unlawfully discriminated or wilfully deprived of any of her Civil Rights, etc. by the professionals with their artifices, by their clients and by the state judges' disputable presumptions, their intentional evil thoughts, words, misdeeds, omissions, illegal decreeing, etc., why was she selected from Society to have such unlawful crimes committed against her inside the State of California Courts by knowledgeable professionals, where every judge and lawyer in America knows that a lawyer must have proofs of Title of Ownership, Probable Cause, Proper Joinders of Party(ies), Damages, Witnesses, etc. to prove his client's allegations beyond a reasonable doubt before the lawyer first

attempts to make preliminary contact with his client's victim(s)?

Before both U. S. Courts in San Francisco, Ca. (the Courts which have power to protect her rights secured by the National Constitution, but neglected to do its duty as set forth in Sec. 2403, Title 28), Petitioner argued that a Federal Question, as well as the Constitutionality Challenge to the Federal Law, were involved therein. She also argued that the Federal Jurisdictional $10,000 minimum as specified in Title 28, Sec. 1331 hurts her and in her opinion it also controverts the Constitutional Guarantees of Art. III, Sections 1 & 2 thereof, and Amendment VII of the National Constitution. Thus, the Attorney General, if he agreed, could present the necessary facts and law relating to the Question of Constitutionality, whether waiver should be granted, whether he should intervene and sue the State of California in her behalf and in behalf of any other adversely-affected persons residing in California since the State of California condoned the illegal-decreeing of a Default Judgment and enforcement thereof against an alleged defaulter without probable cause and without judicial trial. In fact the Attorney General could have investigated whether the perjuries, as complained by Petitioner, concerned matters material to Cecil E. Pope, et al. suit against her, etc?

Petitioner Blanche David argued that the $10,000 requisite can be waived when it collides with any person's substantive rights to Due Process of the Laws, etc. She argues before this Court that in the two Federal Courts Respondents intentionally ignored the "waiver" provision. They knew that it was applicable to her. They know, without the waiver, that Sec. 1331 in a Federal Court can also deprive any person, including Blanche David, of her rights to seek due

course of justice to overturn their wilful miscarriages of justice & their void State Default Judgment, etc., illegally-obtained from an unfair judge & enforced by his intentionally circumventing all the Due Process of the Laws, etc. in favor of Cecil E. Pope, et al., & by Cecil E. Pope, et al; Their Lawyer, John A. Putkey; His Agent, the alleged Process Server; The Insurers of Cecil E. Pope, et al's insured property & Their Lawyers ruthlessly & wilfully committing extrinsic frauds against Petitioner and Property Rights of Her Brother.

The evildoers' sneaky sordid acts & actions could have driven any sane person into a mental institute (1) on Sept. 15, 1970 when delivery of their evil papers took place while Petitioner was at the Office and her Brother first discovered that Cecil E. Pope, et al. and Judge of the Judiciary Dept. of the Govt. of the State of Calif. persecuted and prosecuted her over insured real estate property which they knew belonged to Petitioner's Brother, and (2) by their despotic abilities to continually and wilfully deprive her of Her Constitutionally-Guaranteed Rights to routinely impeach their frauds.

Those betrayals of routine justice shattered Petitioner's faith with State of Calif. personnel, namely, State Judges of its Judiciary Dept. & State Lawyers assigned to the Attorney General's Office of the Executive Dept. of the Government of State of Calif., who deliberately violated legislated laws of the Legislative Dept. of its Government, as well as the Constitutional Laws and Guarantees of the National Constitution. Equally shocking, she has also been reverberated by Federal Judges in S. F.

Petitioner argues before This Court that the Federal Judges' inexcusable errors, especially their inabilities to recognize that Blanche David is entitled to the "waiver", also deprived her of her Constitutionally-Guaranteed Rights to Due Process of the Laws, etc., which she purposely sought in the District Court, after meeting such obstructions of justice in State of California's Courts. Why are the Federal Judges blind to the oppressions she

suffered when she learned for the first time on Sept. 15, 1970 that her life was ruined by wilful despotisms of a State Judge who had already condemned her without proof, without allowing her a Day in Court, without hearing her? He knew he stripped her of all her Constitutionally-Guaranteed Rights, e.g., Her Right to Be Presumed Innocent Rule, etc. The Federal Judges' errors do cover up and/or also endorse Respondents' devious methods of obstructing routine Public Justice for Blanche David.

It seems that Lawyers & Insurers in Calif. are the Judges and writers of the Decisions which they put before nonreading judge for his signature and who forgets to mail out Notices to their victims. Petitioner is also convinced that none of the Federal Judges read her Pleadings. Therefore they are ignorant of the active extrinsic frauds, oppressions, etc. The record shows that Respondents persuaded them to ignore Petitioner's injuries but to jointly sanction (1) the illegal-decreeing of the Default Judgment, etc. by the State Judge against the intentionally-misjoindered multidefendant, separately, (Respondents knew that she was not timely apprised of their illegal 1969 suit #148707, which they knew should have never been filed, if Lawyer John A. Putkey exercised a little care; that she was not present; was not represented by a lawyer to defend her at any stage of their illegal suit; was not allowed routine Due Process of the Laws, etc. in a State of Calif. Court entirely without jurisdictions as to PERSON, SUBJECT and ILLEGALLY-LEVYING SANCTIONS without reason, etc. against an absent person and against insured real estate property solely owned by a disabled war veteran, without giving NOTICE to him, etc.), and (2) the illegal-enforcements of the State of Calif. Judges' injurious State Court Decrees against her and property solely owned by the veteran, which were issued by them in reckless defiances of the Mandates set forth in Frow v. De La Vega, supra; in Hovey v. Elliott, supra; in U. S. v. Throckmorton, supra; in Hughes Tool Co. v. TWA, Inc., supra; in CCP

Section 389, et al., and which Mandates should have been evenly, fairly and uniformly applied to Blanche David and, of course, to the real estate property solely owned by her brother, which was adequately insured.

The Attorney General of the U. S. never had the opportunity to give considerations to and examine Petitioner Blanche David's Federal Questions, Constitutionality Challenge to Sec. 1331, Title 28 versus Article III, Sections 1 & 2 thereof, and Amd. VII of the National Constitution; her Complaints, Substantive Injuries to her Fundamental Rights to Due Process of the Laws, etc., to the Guarantees of the Bill of Rights, etc. For example, to determine WHY, while absent from the Court Proceedings, she was not protected by the Equal Protections and Equal Treatments of the Law Clause of the National Constitution, Its Amendments, Amds. V and XIV, Sec. 1 thereof's Due Process of the Law Clauses before the Court's Decreeing Processing were improperly activated against her? Why the Deputy Sheriff of San Mateo County failed to bring her into Court? Why the State Judge failed to order the Complaint #148707 to be amended and remove Blanche David from the Caption of said Complaint since it was proven in Court on November 30, 1970 that she was not the owner and is not the owner of the real estate property? Why she was wilfully deprived by the State Judges of the Judiciary Department of the Sovereign State of California, together with the Lawyers representing Cecil E. Pope and Margaret S. Pope and Their Insurer, of her Constitutionally-Guaranteed Rights and Federally-Protected Rights to Due Process of the Laws to be permitted to file a timely or untimely Answer Document to the fraudulent Complaint #148707 instigated by Cecil E. Pope, et al., to be permitted to defend and present evidence against all their false charges, to have a trial by jury with competent legal counsel defending her, examining and cross-examining her accusers, to con-

front the perjurers, etc., to due process of the laws to impeach the State of California Judiciary Department's illegally-decreed fraudulent default judgment, as well as the void Complaint, etc? Why did her brother's Insurer of Contingent Liabilities breach its contractual obligations to full defense of any lawsuit, and why did it simultaneously limit its legal services to his sister and to his insured property?

Additionally, the U. S. Attorney General was denied the opportunity to make a decision as to whether to intervene in this Rule 44 (Sec. 2403, Title 28) Case. This harmful omission is beneficial to the Sovereign State of California and to all named Respondents herein since the State of California can invoke and it has unfairly and incorrectly invoked its "Sovereign Immunity" Privilege to Petitioner Blanche David's detriments. Such invocation aids the Respondents by concealing and/or illegally endorsing all their extrinsic frauds wilfully perpetrated against her person and her brother's insured real estate property by the secret filing of the fraudulent Complaint #148707 of Cecil E. Pope, et al. v. Blanche David, et al. in the State of California Superior Court; their wilful malicious prosecutions of Blanche David, misjoindered multidefendant, without her knowledge, without Probable Cause, without Due Process of the Laws, without Equal Protections and Equal Treatments of the Laws, without joinders of "real" Indispensable Parties, without a Judicial Trial ever conducted, etc., and by their systematically, wilfully-schemed obstructions of justice each time she tried to Vacate their illegally-decreed State of California fraudulent Default Judgment, etc. She was adversely affected by the act of the Judiciary Department's Judge when he illegally-decreed such a void Default Judgment which Cecil E. Pope, et al. obtained by practicing extrinsic frauds on the Court and on Blanche David, without her knowledge, without her lawyer on the

scene to protect her, etc. (Appendix I).

The two Federal Courts' major omission to give Notice to the Attorney General of the U. S. did defeat Blanche David's rights to seek Due Course of Justice, as guaranteed by the Constitution and Supreme Laws and Rules of the U. S., etc. within the Federal Court System. Her rights to natural justice also came to a grinding halt because of the District Judge's failure to follow the Rules of Section 2403, Title 28 U.S.C. Whereas, if the Attorney General of the U. S. under Sec. 2403, Title 28, decided to protect and/or enforce the Constitutionally-Guaranteed Rights, etc. of injured Blanche David and sue California for authorizing the violations thereof, etc., the Attorney General of the United States' suit against California to enforce her Constitutionally-Guaranteed Rights, e.g., to Due Process of the Laws, etc. to Impeach the State of California Judiciary Department's illegally-decreed Default Judgment since the State Courts intentionally deprived her of her Right to Due Process of the Laws to remove its void Decree, etc., such suit is not barred by the Eleven Amendment's Sovereign Immunity Protection Provisions since suit by the Attorney General of the U. S. is suit by the United States to which the Eleventh Amendment does not apply and such suit is not barred by the Tenth Amendment.

Since Petitioner's current action is a Petition For Writ of Certiorari, awaiting certain affirmative notices from the Supreme Court, if that occurs, then the Justices of The Supreme Court can reflect upon the State of California Attorney General's arguments that the State is saved by Sovereign Immunity Doctrine. Which brings up questions? Does the Immunity Privilege mean to Petitioner here that the State of California deplores the acts of its judges' illegally-decreeing against her or is the State of California boldly authorizing its judges' wrong acts of illegal decreeing?

Now that the State of California Attorney General

has re-instituted this dilemma for this Petitioner by again unfairly invoking the Eleventh Amendment to again obscure the wrong acts of the State, and those of the private individuals and also to conceal that the State had wilfully deprived Petitioner of her Constitutional Guaranties to Due Process to Remove the wrongs of the State, et al., this Court may have to decide whether the Fourteenth Amendment has the effect of overruling the Eleventh?

Meanwhile Petitioner still adheres to Mr. Justice Brandeis' keen rationale:

> "Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment have no bearing upon the power of this Court to protect rights secured by the federal constitution." Iowa-Des Moines National Bank v. Bennet, 284 U.S. 239,246, n. 5 (1931).

His prudency brings into focus the rights which have been created by the ultimate sovereignty, the people, in the form of the Constitutional Guaranties. Those are the specific Constitutional Rights which the State Government wilfully deprived Petitioner of when its judges first deviated on April 2, 1970 from the Mandates set forth in Frow v. De La Vega, supra, et al., and vehemently refused to reverse the State's wrong acts, etc.

Mr. Justice Brandeis' remarks will also serve as Petitioner's rebuttals to the Attorney General of the State of California and to the Federal Judges in San Francisco. The Eleventh Amendment can no longer be used to obstruct her Constitutional Rights to Due Process to Set Aside The Wrong Acts of the State, et al.

While in the Federal Courts this Petitioner opposed the Attorney General's reliance on the Eleventh Amendment by her steady reliance upon the Indispensable Party Joinder Rule (Rule 19, F.R.P.), but which Rules the State Courts and her accusers intentionally disobeyed because CCP Section 389

would have automatically invalidated the Judgment awarded to Cecil E. Pope and Margaret S. Pope. She also reminded the State Attorney General in her Reply Brief that she was interested in obtaining Due Course of Justice without further delay; that she merely was complying correctly with the Indispensable Party Rules (Rule 19, F.R.P. & CCP Sec. 389) by naming the State of California in her suit on grounds that the wrongful acts, were also acts of the State; that those wrongful acts (e.g. illegal decreeing and enforcing of the illegal default judgment) emanated directly from its Judiciary Departments of the State Government of California during the times the Superior Court and Courts of Appeals of the State of California were illegally acting in the Pope, et al. v. David, et al. cases; that in Amendments V & XIV, this Nation agrees not to deprive without due process and not to let a State do so. Therefore, State and Federal Judges in the United States of America have powers only to do justice, not injustices, and to protect those rights secured by the Federal Constitution and which rights the Judiciary Departments of the State of California wilfully deprived her of during all the times they were illegally proceeding in the State Courts in Pope, et al. v. David, et al. suits contrary to the Commands of the National Constitution, et al.

Petitioner after exhausting her State and Federal Remedies has no other recourse but to Petition The Supreme Court of The United States for judicial resolutions of all the misapplications/misinterpretations/nonapplications of the Constitutional Laws, etc. by certain State and Federal Judges and Judicial Officers, who are responsible for having wilfully deprived this substantively-injured Petitioner of all her Constitutional Guaranties to Due Process to Vacate State of California's illegally-decreed fraudulent Default Judgment, etc. given to two strangers for no valid reason. It is unfair that the State of California's Attorney General also

failed to investigate Petitioner's charges that wilful perjuries were perpetrated against her and her rights as Private Citizen by Respondents Cecil E. Pope, et al., and Their alleged Process Server, together with the Deputy Sheriff of The State of California San Mateo County Sheriff's Office whose intentional failures to respond to her inquiries in March 1970, causing the Petitioner substantive injuries, etc., from the date (October 1969) they secretly filed their illegal suit against the misjoindered multidefendant, and continuing with no relief in sight.

Substantiating her Complaints as to the failures of the State Judges and Lawyers of the Judiciary Departments and Lawyers in the Attorney General's Office of the Executive Department of the State Government to perform their Constitutional Duties, fairly, equally, uniformly, etc., Appendix Q reveals that the Judiciary and Executive Departments of the State of California practice double standards and that there are also serious conflicts within the U. S. Federal Courts and U. S. Governmental Agencies regarding the proper decreeing of default judgments.

The Judiciary Department of the State of Calif. in August 1975 set aside the Default Judgment issued Rock Singer Mick Jagger by properly complying with the 1973 Mandates laid down by The Supreme Court of The United States in the case of Hughes Tool Co. v. TWA, Inc., supra, whereas the State of California's Three Justices in the Court of Appeal of the State of California, First Appellate District, Division One, on February 13, 1973 (with endorsements of its State Attorney General in 1974 to present) intentionally refuse to apply the same Supreme Court of the United States' applicable Mandates to Private Citizen Blanche David, which relief she has pleaded for since September 15, 1970, the first time she saw the illegal papers showing that she was illegally sued by two strangers in the State of California Superior Court San Mateo County, Redwood City,

California, Complaint #148707. (Appendix O).

Referring to Appendix Q again, it alerted Blanche David and other interested persons that attorneys for the late Howard Hughes, the owner of Hughes Tool Co., et al., also appealed to the Ninth Circuit to Vacate the Default Judgment decreed against Howard Hughes by a U. S. District Judge in the Northern District of California in the year 1975. Consequently, Petitioner Blanche David awaits the result of that "Parallel" Appeal (same problem, improper default judgment decreeing issue, same Circuit Court of Appeals), etc. A further reading of the newspaper article, now referred by Petitioner as Appendix Q shows that default judgments are recklessly-issued in Courts and that Federal Agencies located within this State are also confused regarding the withholding the granting of a default judgment, or when and if to issue, etc.

In view of those disputes, the Reviews and Clarifications of Procedures relating to properly-granting of Default Judgment by California State and/or Federal Judges, are urgently required to be undertaken by All The Justices Of The Supreme Court Of The United States, in the interests of every person, including Petitioner Blanche David, residing within the State of California or any other State of the United States of America faced with this issue.

Since said Courts, the State of California Attorney General, and Lawyers herein involved are in serious conflicts with The Supreme Laws of the Land and with Mandates of The Supreme Court Of The United States; with Decisions of The Second Circuit Court of Appeals, Burlington, Vt., The Eighth Circuit Court of Appeals, St. Louis, Mo., and with The U. S. District Court, Southern District of N. Y., N. Y., and various State Courts located in the United States, and those conflicts have unlawfully subjugated Blanche David, an innocent person, wilfully deprived her of her Civil Rights, etc., this Petitioner therefore prays that

this petition be granted and a Writ of Certiorari issue to review the judgment, opinion and orders of the Ninth Circuit in view of its obstinate antagonistic reactions to The Supreme Court of The United States Mandates laid down in Frow v. De La Vega, supra, et al., in Hughes Tool Co. v. TWA, Inc., supra, et al., Rule 44, to the Guarantees of the Federal Constitution, et al., or consider Her Petition A Call For An Exercise Of This Court's Power of Supervision of this controversy in its entirety.

Petitioner Blanche David maintains that since she exhausted her State remedies as evidenced in Appendix P , a page from the Court of Appeal of the State of California First Appellate District, Division Three, she correctly and legally sought affirmative relief in the U. S. District Court, Northern District of California, correctly asserting therein that the State of California Superior Court from the outset lacked jurisdictions of subject matter and person; entered Judgment it had no power to enter and Judgment was obtained without Due Process of the Laws; that the U. S. District Court had jurisdiction of her Petition (Elliott v. Peirsol, 1 Pet. 328, 340, which is cited in Thompson v. Whitman, 18 Wall (85 U.S.) 457), and that Article III, Sections 1 and 2 thereof, and Amendment VII of the Constitution of the United States secured her rights to a jury trial within the Federal Court where the value in controversy shall exceed twenty dollars and that a Cause of Action rested against Respondents named herein.

The amount of the illegally-decreed and illegally-enforced-obtained-by-extrinsic-frauds,-etc.-Default Judgment against Blanche David and illegally awarded to Cecil E. Pope, et al., in the State of California Superior Court, is 350 times $20 or $7,000 (Appendix D), exclusive of interest, Court Costs, legal expenses, losses of her annual leave, etc. Consequently, her lawsuit to sue the wrongdoers in the U. S. District Court For The Northern District of California, falls within the jurisdictional guaran-

ties of Amendment VII of the Federal Constitution. Thus Petitioner argues that the District Judge erred when he issued Dismissal Orders instead of ordering further proceedings. His fatally-defective Orders and concurrences thereof by the U. S. Court of Appeals, Ninth Circuit deprived Petitioner of Her Day in Federal Court to overturn the wrong acts of the State of California Judiciary Departments, et al. Too long, she has been inequitably prevented by Federal and State Courts located in California from defending against State of California's illegally-decreed and illegally-enforced Default Judgment, etc. and the wilful deprivations of her Constitutionally-Guaranteed Rights, Rights to sue her antagonists in the Federal Courts for all their illegal acts and actions of the State, et al., which were wilfully committed against her in the Judiciary Departments of the State of California, U. S. A. (Appendix A).

Appendix S shows that Blanche David's lawyer deposited approximately $9,800. in 6% Treasury Notes in response to Appendix R, Cecil E. Pope and Margaret S. Pope's Order of Examination. Appendix T indicates that when the State of California Appeal Court Judges wilfully deprived her of all her Constitutionally-Guaranteed Rights to Due Process of the Laws Before Her Personal Funds were seized from her to give to two strangers, her 6% Treasury Notes were disposed of by County of San Mateo.

Appendices U-V & W are copies of the Cases Petioner relies on to seek affirmative relief in this Court from the illegally-decreed default judgment unlawfully enforced against her by Respondent State of California Superior Court San Mateo County, Redwood City, California, on April 2, 1970 in the Pope, et al. v. David, et al. suit and illegally-entered on June 10, 1970 approximately 96 days before any of the misjoindered multidefendants were apprised of Pope, et al. v. David, et al. Case #148707.

If The Supreme Court of The United States decides

to review this Petitioner's Requests for Equitable Relief from all named Respondents' misdeeds, etc. The Reporter's Transcript shows that on November 30, 1970 the [illegible]ne State of California Superior Court Judge admits his intentional malices against Blanche David when he personally read her urgent inquiry dated July 18, 1970 (Appendix J) and decided not to answer her.

That specific misconduct deprived this Petitioner of her Right to be advised of any Judicial Proceeding involving her. That intentional omission wilfully deprived her of all her Constitutionally-Guaranteed Rights to Due Process, etc. Civil Rights, etc. He also personally trespassed upon the Rights of her Brother and his Title to His Real Estate Property when he levied the State of California void Default Judgment against it, in excess of the amount stated in the void Complaint #148707 filed in behalf of Cec[illegible]l E. Pope and Margaret S. Pope against the insured Real Estate Property owned solely by Her Brother. The State of California Judge h[illegible]d no jurisdictions to the insured Real Estate and to the alleged multidefendants in the Pope, et al. v. David, et al. Case #148707 and Cecil E. Pope, et al. knew those facts before their Lawyer, John A. Putkey, filed it. (Appendix D v. B).

Yet it was their Lawyer's legal responsibility to inquire into why his "new" clients decided to sue the Owner's Sister? why his clients never had a drainage device since the year 1959? and to require his clients to produce copies of their Notices to their land developers, engineers, et al., to their builder, etc., to the Owner and His Insurers, and of course to their Insurers, et al. alleging damages to their insured property, etc., and copies of Responses therefrom. In other words what efforts did his clients and their Insurers make to avoid costly litigation?

With respect to the Superior Court Judge's

Constitutional and Common Law duties in the year 1969, it was his judicial responsibilities to read the Complaint; to question whether Complaint #148707 was timely filed? to issue an Order for production of historical background of the charges; to question why the case was not settled by the Insurers of Properties located at 2822 and 2826 Tiburon Way, Burlingame, California, etc?, etc.

With respect to the Superior Court Judge's Constitutional and Common Law duties on November 30, 1970, they were unavailable to Blanche David. The Judge wilfully refused to render Justice to her despite the fact that her short-term Lawyer proved that John A. Putkey, Lawyer for Cecil E. Pope, et al. did not comply with CCP Sec. 587 (See Appendix J).6/ Her Lawyer also proved that the Complaint which Lawyer John A. Putkey drafted for his Clients Cecil E. Pope, et al. against Blanche David, et al., on its Face was vile, contains false claims, etc., and should be quickly removed, etc. (See Appendix I); Blanche David's Lawyer also proved that CCP Section 473 and 473(a) could set aside such a void Complaint, void Default Judgment, etc., and that in the interests of justice it should be done as no judicial trial was held, etc., that she should have never been sued, and that Cecil E. Pope, et al. injured her, et al. (Appendix L).

Even without proofs presented by her Lawyer on November 30 and December 29, 1970 in behalf of Blanche David, it was perfectly obvious that the State of California Default Judgment was void on grounds that the State of California acted in clear absences of all jurisdictions as to party and subject matter 1 in awarding Plaintiffs $7,000 plus, instead of $6,000 as plainly pleaded by them in Paragraph VII of their fraudulent Complaint (See Appendix B) 2 insufficent facts stated to constitute

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6/ Declaration of Joseph Jedeikin, Esq. In Support of Motion to Set Aside Default...Filed November 12, 1970 (Appendix I).

Cause of Action against any of the misjoindered multidefendants 3 insufficient proofs of plaintiffs' Title and ability to sue, etc. at the April 2, 1970 Hearing 4 no proof of Title as to any of the alleged multidefendants, Blanche David, et al., and to whether each alleged multidefendant was legally liable to be sued by the strangers, Cecil E. Pope and Margaret S. Pope 5 the absences of joinders of the Owner of 2826 Tiburon Way, Burlingame, California, his Insurers, and, of course, the "real" Indispensable Parties legally liable to be sued were the land developers, their engineers, et al 6 no proof as to damage(s) 7 misjoindered multidefendants were not apprised of the fraudulent suit before the July 16, 1970 incident, personally and cruelly provoked by Cecil E. Pope, against Blanche David while she was inside an automobile. (It was the City of Burlingame Police Officer who told her on July 16, 1970 to contact Judge Rose) 8 that no Service was made on Blanche David, et al. prior to September 15, 1970 9 that her Attorney handling her Personal Injury Lawsuit No. 128459 in the same State of California Superior Cout was not apprised of the suit #148707 10 that the opposing Attorney in Case No. 128459 did not advise Blanche David (a) of the Class Action resting against his Law Firm's Clients, namely, the Land Developers, Engineers, Builders, et al., which his Law Firm was concurrently defending and which Cecil E. Pope and Margaret S. Pope refused to join as Plaintiffs, and (b) of the Pope, et al. v. David, et al. suit 11 The State of California Superior Court itself failed to make Notices available to any of the misjoindered multidefendants 12 The State of California, San Mateo County Sheriff's Office failed to notify the Superior Court Judge that Blanche David and Her Brother made inquiries to his Office concerning the surprise visit in March 1970 of an alleged Sheriff on the premises solely owned by her Brother. Said State Government's Sheriff's Office failures to produce those "key" evidences in March 1970 is entrapment

which is illegal. It prevented her from making an appearance in Court to Quash the void Court Decrees illegally-obtained by Cecil E. Pope, et al.

With respect to arguments presented by her short-term Lawyer on December 29, 1970, the same State of California Superior Court Judge still refused to set aside that void Default Judgment under any circumstances (See Appendix F). The record shows that he had a Constitutional Duty as early as July 1970 to set aside his illegally-issued Default Judgment, etc., and he should have ordered or given Leave to Cecil E. Pope and Margaret S. Pope, to Amend Their Fatally-defective Complaint #148707 by Removing Blanche David from the Caption of Their Complaint #148707; order joinders of "real" Indispensable Parties, namely, Land Developers, Their Engineers, Builders, Architects, et al., and allow those "real" Multidefendants Time to Answer the Amended Complaint of Cecil E. Pope, et al; award a Summary Judgment to Blanche David for her pains and sufferings, etc., and award a Summary Judgment to Her Brother for illegally trespassing on His Title to His Insured Real Estate Property, etc; for illegally suing her disabled Brother for the wrong acts of land developers, their engineers, contractors, architects, etc., and for causing him pains, sufferings, etc. Cecil E. Pope and Margaret S. Pope knew that they sued two innocent persons for Acts of God, the land developers, et al., and for their failures to negotiate with their builder, etc.

Petitioner Blanche David knows that CCP Section 473 should have been properly enforced by the State of California Superior Court as early as July 1970 (upon receipt of her July 18, 1970 Letter), and certainly on November 30 or December 29, 1970 because according to the Case of Thorson v. Western Development Corp. (1967), 59 Cal Rptr 299, 251 C.A. 2d 206 "THERE ARE NO TIME LIMITS ON MOTION TO VACATE OR SET ASIDE JUDGMENT WHICH IS VOID ON ITS FACE." (underscoring supplied by Petitioner).

She also knows that the Court of Appeal of the State of California, First Appellate District, Division One, on February 13, 1973, had no right to intentionally circumvent Section 473 and Sec. 587 of CCP and add additional injuries to the victim. (See Appendix O). It should have Ordered the void Judgment Vacated, etc.

Blanche David objects to the State of California wantonly invoking its "Immunity Privilege" rather than removing its Judges' illegally-decreed and illegally-enforced Court Orders from her Person, etc. It is criminal to keep them against an innocent person residing in the United States of America for the benefits of its Judicial Officers, et al., for Cecil E. Pope and Margaret S. Pope, et al.

Extrinsic frauds were wilfully committed against Petitioner by its Judicial Officers, et al. (Judges and Their Legal Staff; Lawyers, Sheriff) and by certain citizens of the State of California, herein named as Respondents.

The Sovereign State of California knows that she legally sought equitable relief, etc. from all the wrong acts of the Sovereign State, as well as those committed by the other Respondents, by appealing to the Judiciary Departments (e.g., Superior Court; two (2) Courts of Appeal of the State of California and twice rejected by its Supreme Court) of the State Government and to the Judiciary Departments (e.g., U. S. District Court and Court of Appeals, Ninth Circuit) of the Federal Govetrnment, and is now entitled to request The Supreme Court of The United States to Review the erroneous Decision of The Court of Appeals For The Ninth Circuit in upholding the wrongs which she sought relief therefrom and in view of the Ninth Circuit's inabilities to recognize that The State of California Courts did disobey The Supreme Court of The United States Mandates barring the illegal-entry of Default Judgment. (Appendix U and Appendix W).

Consequently, Blanche David is still the State of California's Victim of the worst kinds of tortures /the illegally-decreeing and the wilful enforcement of the illegally-decreed Default Judgment against an innocent person; convicted Petitioner before hearing her, without conducting a Judicial Trial or Trial By Jury, without evidence, etc; circumventing constitutional and common laws; wilfully deprived her of Constitutionally-Guaranteed Rights to Due Process, etc./ wilfully imposed upon her under State of California Judicial Sanctions and Superintendence; also by the intentional malfeasances, misfeasances, etc. of its Judicial Officers (Judges, Lawyers, Sheriff), intentional nonfeasances, etc. of its Attorney General, as well as in the background by her brother's Insurer's intentional breach of contractual obligations to defend against any suit, to pay the Default Judgment, etc., and with the quiet approvals of the Court of Appeals For The Ninth Circuit and the U. S. District Court For The Northern District of Calif., who are all in open conflicts with Decisions of The Supreme Court Of The United States, etc., and in wilful infringements of The Federal Constitution, Its Amendments and Petitioner's Constitutionally-Guaranteed Rights to Due Process, Equal Treatments and Equal Protections of the Laws.

CONCLUSION

For the reasons stated herein Petitioner prays that this petition be granted and a Writ of Certiorari issue to review the judgment of the Court of Appeals.

DATED: June 4, 1976

Respectfully submitted,

BLANCHE DAVID, Propria Persona
2826 Tiburon Way
Burlingame, California 94010
Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLANCHE DAVID,

Plaintiff-Appellant,

vs.

STATE OF CALIFORNIA, CECIL E. POPE and MARGARET S. POPE; CECIL E. POPE and MARGARET S. POPE, AND THEIR INSURERS OF CONTINGENT LIABILITIES, JOHN A. PUTKEY, DUANE E. CLAPP, JR., RICHARD B. MELBYE,

Defendants-Appellees.

No. 74-3095

O R D E R

Before: TRASK and SNEED, Circuit Judges, and EAST,* District Judge

The petition of plaintiff-appellant has been considered and it is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM L. WHITTAKER
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIF. 94102

Case No. C-73-2002-SC March 16, 1976

DAVID BLANCHE Vs STATE OF CALIFORNIA, et al.,

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit was filed today in the above captioned case.

Yours very truly,

Tom Johnston
Case Systems Administrator

TOM JOHNSTON

Distribution: Civil - Counsel of Record
Criminal - Counsel of Record
United States Marshal
Probation Office
Clerk, United States Court of Appeals

NDC App-11

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

FILED
MAR 15 1976
WILLIAM L. WHITTAKER, CLERK

BLANCHE DAVID,
Plaintiff-Appellant,
vs.
STATE OF CALIFORNIA, CECIL E. POPE and MARGARET S. POPE, CECIL E. POPE and MARGARET S. POPE, AND THEIR INSURERS OF CONTINGENT LIABILITIES, JOHN A. FUTCHY, DUANE E. CLAPP, JR., RICHARD B. MELBYE,
Defendants-Appellees.

No. 74-3095
DC # CIVIL 73-2002, Judge Conti

APPEAL from the United States District Court for the NORTHERN
District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST MAR 12 1976
EMIL E. ATLEE, JR.,
CLERK
by Tom Johnston
Deputy

Filed and entered December 20, 1975

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BLANCHE DAVID,
Plaintiff-Appellant,

vs.

STATE OF CALIFORNIA, CECIL E. POPE and MARGARET S. POPE, CECIL E. POPE and MARGARET S. POPE, AND THEIR INSURERS OF CONTINGENT LIABILITIES, JOHN A. PUTKEY, DUANE E. CLAPP, JR., RICHARD B. MELBYE,
Defendants-Appellees.

No. 74-3095

MEMORANDUM

[December 30, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: TRASK and SNEED, Circuit Judges,
and EAST,* District Judge

This appeal is taken by Blanche David, in propria persona, from a judgment of the district court dismissing her complaint against all defendants joined by her in her action entitled a "Petition for Review of a Judgment of California State Court." We affirm.

The controversy began with a default judgment in California State Court entered against appellant in favor of defendants Cecil and Margaret Pope. The Popes obtained both damages and injunctive relief for trespass for injuries to their real property resulting from the dumping of rain waters on their land by Blanche David, the alleged occupier or owner of the adjoining land.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Appellant David did not appear in the Pope action, taking the position that she had not been properly served. After hearings on the issue, this contention was rejected by the state trial court. David then appealed to the Court of Appeal of the State of California, First Appellate District, Division One (Civil Number 30303) which reviewed the issues in a lengthy opinion and affirmed the trial court. Her appeal to the Supreme Court of California was denied.

Appellant then began her action in the United States District Court to review the action of the California State courts. She joined the following parties: 1. The State of California; 2. Cecil and Margaret Pope; 3. Insurers of contingent liabilities for the Popes (unknown at this time); 4. John A. Putkey, Esq., attorney for the Popes; and 5. Duane E. Clapp, Jr., Esq., and Richard B. Melbye, Esq., attorneys for the liability insurer of Mr. and Mrs. Pope.

Although the complaint set out many alleged deprivations that appellant claims she has suffered, there was no jurisdictional statement except a general reference to the Constitution of the United States and to section 1 of Amendment XIV in particular. The most obvious bases for federal jurisdiction in an action for tortious personal wrong are either 28 U.S.C. § 1332 (Diversity of Citizenship) or 28 U.S.C. § 1331 (Federal question jurisdiction upon which a denial of due process might be predicated). The default judgment here amounted to approximately $7,000. No claim is asserted which meets the $10,000 jurisdictional minimum required by both statutes for actions in the federal courts. Consequently neither is helpful.

There are numerous other difficulties which might beset appellant's claims, but because this court can discern no conceivable jurisdictional basis for this action, we have concluded the district court was correct in entering its judgment of dismissal as to the private parties. The State of California may not be reached because of its sovereign immunity. *See Employees v. Missouri Public Health Department*, 411 U.S. 279, 280 (1973), and cases cited therein.

The judgment of the district court is affirmed.

PERRAU-WALSH PRINTING CO., SAN FRANCISCO 1-6-76—600

FILED

FEB 13 1976

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLANCHE DAVID,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 74-3095
STATE OF CALIFORNIA, CECIL E. POPE and MARGARET S. POPE; CECIL E. POPE and MARGARET S. POPE, AND THEIR INSURERS OF CONTINGENT LIABILITIES, JOHN A. PUTKEY, DUANE E. CLAPP, JR., RICHARD B. MELBYE,	)	ORDER
Defendants-Appellees.	)	

Before: TRASK and SNEED, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Trask and Sneed have voted to reject the suggestion for a rehearing en banc. Judge East recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Blanche David, Per Se
2826 Tiburon Way
Burlingame, California 94010

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLANCHE DAVID,	)	NO. CA 74-3095
Plaintiff-Appellant	)	NOTICE OF APPEAL FROM U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT ORDERS ENTERED MARCH 15, 1976 AFFIRMING U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIF. DISMISSAL ORDERS
vs.	)	
STATE OF CALIFORNIA, CECIL E. POPE and MARGARET S. POPE, CECIL E. POPE and MARGARET S. POPE, and THEIR INSURERS OF CONTINGENT LIABILITIES, JOHN A. PUTKEY, DUANE E. CLAPP, JR., RICHARD B. MELBYE,	)	
Defendants-Appellees	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. NOTICE IS HEREBY GIVEN THAT BLANCHE DAVID, APPELLANT ABOVE NAMED, IN PROPRIA PERSONA, HEREBY ADVISES THAT SHE IS COMPELLED TO FILE A PETITION FOR WRITS OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES INASMUCH AS SHE IS STILL SUFFERING FROM ALL THE MISCARRIAGES OF JUSTICES ALLOWED TO REMAIN AGAINST HER MAINLY DUE TO THE FACTS THAT STATE AND FEDERAL JUDICIAL OFFICERS DID NOT COMPLY WITH THE SUPREME COURT OF THE UNITED STATES PRECEPTS LAID DOWN IN FROW vs. De La VEGA, 15 WALL (82 U.S.) 552, 21 L.ED. 60, AND IN HOVEY vs. ELLIOTT, 167 U.S. 409 /414, et al./ BARRING ANY JUDGE FROM GRANTING AND ENTERING A DEFAULT JUDGMENT AGAINST THE DEFAULTING DEFENDANT ALONE WHILE THE ACTIONS ON MERITS ARE STILL PENDING AGAINST REMAINING MULTIDEFENDANTS, AND BARRING ANY JUDGE FROM

DEPRIVING ANY PERSON OF DUE PROCESS OF THE LAWS, ETC. /417, et al./ RESPECTIVELY. THEREFORE APPELLANT IS APPEALING TO THE SUPREME COURT OF THE UNITED STATES FROM THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT ORDERS ENTERED MARCH 15, 1976 AFFIRMING THE LOWER COURT'S DISMISSAL ORDERS RELATING TO THE FATALLY DEFECTIVE STATE OF CALIFORNIA COURT DECREES.

THIS APPEAL IS TAKEN PURSUANT TO 28 U.S.C.A. §1254(1).

II. THE CLERK WILL PLEASE PREPARE A TRANSCRIPT OF THE RECORD IN THIS CASE, FOR TRANSMISSION TO THE CLERK OF SUPREME COURT OF THE UNITED STATES, AND INCLUDE IN SAID TRANSCRIPT THE FOLLOWING:

CERTIFIED COPY OF DOCKET SHEET MAINTAINED IN CLERK'S OFFICE AT SEVENTH & MISSION, SAN FRANCISCO, CALIFORNIA, IN CA 74-3095.

ALL MOTIONS; BRIEFS; REPLY BRIEFS; NOTICES; PETITION FOR REHEARING SUGGESTION OF APPROPRIATENESS OF REHEARING IN BANC; VOTING RECORD RESULT RELATING TO PETITION FOR REHEARING, ETC; PLAINTIFF-APPELLANT'S MULTIFARIOUS PETITION, AND COURT ORDERS REGARDING CA 74-3095.

ALL MOTIONS; PETITION FOR REVIEW OF STATE JUDGMENT; REPLY BRIEFS; NOTICES; STATUS REPORTS; REQUESTS, ETC. FILED IN THE U. S. DISTRICT COURT FOR NORTHERN DISTRICT OF CALIFORNIA IN CASE NO. 73-2002-SC.

III. THE FOLLOWING QUESTIONS ARE PRESENTED BY THIS APPEAL:

1. Did Ninth Circuit err when it sanctioned State of California Courts' (Court of Appeal, First Appellate District and Superior Court of San Mateo County) deviations from the accepted and usual course of judicial proceeding long mandated by this Court in its 1872 Decision in Frow vs. De La Vega, 15 Wall (82 U.S.) 552, 21 L.Ed. 60, estoppeling lower courts from ever decreeing default judgment against one alleged multidefendant separately, who has allegedly defaulted, while the cause is still pending as to remaining multidefendants charged jointly with her? (The State of California Supreme Court denied Petition for Hearing Appeal.)

   a. Did such error result in substantive injuries to this Appellant's Constitutionally-Guaranteed Rights, Legal Rights to Due Process of the Laws, to Equal Treatments

of Laws, to Equal Protections of Laws, etc., as proclaimed in Amendments V and XIV of the Constitution of the United States of America?

2. Did Ninth Circuit err when it sanctioned State of California Courts' (Court of Appeal, First Appellate District, and Superior Court of San Mateo County) departures from the accepted and usual course of judicial proceedings amplified by this Court in its Decision in Hovey vs. Elliott, 167 U.S. 409 /414, et al./, prohibiting judicial officers from depriving any person of any Constitutionally-Guaranteed Rights To Due Process of the Laws, to Equal Treatments of the Laws, to Equal Protections of the Laws, etc., and from depriving defaulting multidefendant's substantive rights (A) to file Answer before full Court (B) to Rights of Confrontation, Cross-examinations, etc. (C) to File Motion to Vacate Fatally Defective Default Judgment of the Superior Court of San Mateo County, Redwood City, California in the Pope, et al. vs. David, et al., Case No. 148707 and (D) Rights to Appear With Counsel Before a Fair Judge as permitted in Hazard vs. Durant, 12 R.I. 100 to Defend Against all the false allegations of the accusers? (The State of California Supreme Court denied Petition for Hearing Appeal.)

   a. Did such error result in substantive injuries to this Appellant's Constitutionally-Guaranteed Rights (Amds. V & XIV), Legal Rights to Due Process of the Laws, etc?

3. Does The Supreme Court of the United States have Appellate Jurisdiction of Appellant's Petition for Certiorari especially when conflicts existing between the Ninth Circuit and the Eighth Circuit Courts of Appeals have interfered with her rights to seek affirmative relief in her own behalf? (The Eighth Circuit correctly follows the Supreme Court's Mandates as to the preferred practice for State or Federal Courts to withhold granting a default judgment against one multidefendant in a multidefendants case until after the trial of the action on the merits against the remaining multidefendants has taken place, whereas the Ninth Circuit opposes the preferred practices established by the Supreme Court in Frow vs. De La Vega, supra and adopted correctly by the Eighth Circuit in Roach vs. Churchman, 431 F.2d 849 (8th Cir) cited in Exquisite Form Indus., Inc. vs. Exquisite Fabrics of London, 378 F.Supp 403 (1974)

4. Is the State of California Default Judgment Constitutionally Valid in view of the facts that one of the accusers deliberately under oath misrepresented truths to the Judge at the secret April 2,. 1970 Trial where no lawyer was ever present to defend

the accused, and where the accused, as well as the other remaining multidefendants and their lawyers were also excluded? (None of the multidefendants were apprised of the April 2, 1970 trial.)

DATED: MARCH 30, 1976

Respectfully submitted,

Blanche David

Blanche David, Propria Persona
2826 Tiburon Way
Burlingame, California 94010

PROOF OF SERVICE

I, BLANCHE DAVID, APPELLANT, IN PROPRIA PERSONA, AM NOT A LAWYER, HEREBY CERTIFY THAT, ON THE 30th DAY OF MARCH 1976, I SERVED COPIES OF THE FOREGOING NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES ON THE SEVERAL PARTIES THERETO, AS FOLLOWS:

1. ON THE UNITED STATES, BY MAILING A COPY THEREOF VIA REGISTERED MAIL RETURNED RECEIPT NO. _____ TO THE OFFICE OF JAMES L. BROWNING, ESQ., UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 FEDERAL BUILDING, SAN FRANCISCO, CALIFORNIA 94102.

2. ON EACH OF THE FOLLOWING APPELLEES BY MAILING COPIES IN DULY ADDRESSED ENVELOPES, WITH FIRST CLASS POSTAGE PREPAID, REGISTERED MAIL RETURN RECEIPTS, TO THEIR RESPECTIVE ATTORNEYS OF RECORD, AS FOLLOWS:

TO:	RE: APPELLEES	REGISTERED MAIL NOS.
EVELLE J. YOUNGER, ESQ. 6000 State Bldg. S. F., Ca. 94102	STATE OF CALIFORNIA	_____
OWEN, MELBYE & ROHLFF, ESQ. 700 Jefferson Ave. Redwood City, Ca. 94063	CECIL E. POPE, ET AL.	_____
OWEN, MELBYE & ROHLFF, ESQ. 700 Jefferson Ave. Redwood City, Ca. 94063	CECIL E. POPE and MARGARET S. POPE, & TRAVELERS INS. CO., ET AL.	_____
JOHN A. PUTKEY, ESQ. 6767 Mission St. Daly City, Ca. 94014	JOHN A. PUTKEY	_____
ROPERS, MAJESKI, KOHN, ET AL., ESQ. 655 Marshall St., Redwood City, Ca. 94063	DUANE E. CLAPP, JR.	_____

JOHN A. PUTKEY
Attorney at Law
6767 Mission Street
Daly City, California 94014

Telephone: 755-1616

(ENDORSED)
FILED
JUN 10 1970
MARVIN CHARLES, County Clerk
By MADELINE JOHANSON
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SAN MATEO

CECIL E. POPE and MARGARET S. POPE, his wife,
Plaintiffs,
vs.
BLANCHE DAVID, et al.,
Defendants.

NO. 148707

JUDGMENT

The above entitled matter coming on regularly to be heard on the 2nd day of April, 1970, plaintiffs appearing in person and by their attorney, John A. Putkey, Esq., and no appearance having been made by the defendant BLANCHE DAVID, and it appearing that said defendant BLANCHE DAVID was served with a copy of the summons and complaint in this action and that the default of the defendant BLANCHE DAVID was duly entered herein, and testimony having been taken and evidence introduced, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the defendant BLANCHE DAVID, her agents, servants and employees shall be, and they are hereby permanently enjoined and restrained from causing rain waters from their property to be discharged on the property of the plaintiffs.

2. That plaintiffs have judgment against defendant BLANCHE DAVID in the sum of Five Thousand ($5,000.00) Dollars as and for damage to their real property.

JOHN A. PUTKEY
ATTORNEY AT LAW
6767 Mission St.

JOHN A. PUTKEY
Attorney at Law
6767 Mission Street
Daly City, California 94104
Telephone: 755-1616

F I L E D
OCTOBER 22, 1969
MARVIN CHURCH, COUNTY CLERK
BY /s/ Lorraine L. Maura
Deputy Clerk

(E) (INDEXED) (10/28.69) SUMMONS ISSUED)

(The default of defendant Blanche David entered November 26, 1969. MARVIN CHURCH, COUNTY CLERK BY /s/ Sue Wilson, Deputy.)

CECIL E. POPE and MARGARET S. POPE, his wife,

Plaintiffs,

vs.

BLANCHE DAVID, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

NO. 148707

COMPLAINT FOR DAMAGES FOR TRESPASS AND INJUNCTION

Comes now the plaintiffs above-named in the above-entitled action and allege as follows:

I

That plaintiffs have no knowledge as to the true names of defendants sued herein under the fictitious names of FIRST DOE, SECOND DOE and THIRD DOE, and pray leave of this Court that upon ascertaining the true names of said defendants, the same may be inserted herein in the place and stead of such fictitious names.

. . .

10

II

That plaintiffs are the owners of certain real property located in the City of Burlingame, County of San Mateo, State of California, commonly known as 2822 Tiburon Way.

III

That defendants are the owners of certain real property located in the City of Burlingame, County of San Mateo, State of California, commonly known as 2826 Tiburon Way.

IV

That plaintiffs' property and the property owned by the defendants are contiguous at the Westerly side of plaintiffs' property.

V

That within the year last past, immediately preceding this action, the defendants have caused the rain water from their house andfrom their property to be discharged directly into the property of the plaintiffs; that said water is caused to gather underneath the home of the plaintiffs; that said water underneath the home of the plaintiffs causes a damp and unhealthy condition and has caused plaintiffs' home to be undermined.

11

VI

That as a result of said water being discharged onto plaintiffs' property, plaintiffs' property has been damaged in an amount unknown to plaintiffs at this time.

VII

That as a result of said water being discharged onto plaintiffs' property, plaintiffs were deprived of the reasonable and usual enjoyment of their home and plaintiffs have suffered distress in mind and mental anguish to their further damage in the sum of THREE THOUSAND ($3,000.00) DOLLARS RESPECTIVELY.

VIII

That plaintiffs have requested of defendants that they discontinue discharging said waters onto plaintiffs' property and have requested that defendants discharge said water onto the public street; that defendants have refused to abide by plaintiffs' request; that plaintiffs are informed and believe that defendants intend to continue to discharge said water onto plaintiffs' property, that pluintiffs will thereby suffer irreparable damage to their property; that plaintiffs will continue to be deprived of the reasonable use and enjoyment of their home and that plaintiffs will continue to be caused by mental distress and mental anguish.

WHEREFORE, Plaintiffs pray as follows:

1) That defendants be restrained and enjoined, pending the trial of this action, from trespassing upon plaintiffs' property, as hereinabove set forth; and that said restraining order be made permanent;

2) That plaintiffs be awarded damages in such sums as may be determined;

3) For costs of suit herein; and

4) For such other and further relief as may be proper in the premises.

_____

Attorney for Plaintiffs

STATE OF CALIFORNIA)
)
COUNTY OF SAN MATEO)

CECIL E. POPE hereby declares under penalty of perjury:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

. . .

Dated and signed at Daly City, San Mateo County, California, this 29th day of September, 1969.

/s/ Cecil E. Pope

CECIL E. POPE

MINUTES CIVIL AND CRIMINAL, DEPARTMENT NO. 3, VOLUME 174, PAGE 599

(TITLE OF COURT)

APRIL 2, 1970 Present: HON. FRANK W. ROSE, Judge
Arline M. Fitzgerald, CSR
Irene L. Ford, Clerk
Vasco Sardi, Bailiff

(TITLE OF CAUSE)

TRIAL (DAMAGES) - Default

John A.Putkey, Esq., attorney for plaintiffs.

Cecil E. Pope was sworn and testified on behalf of plaintiffs.

Plaintiff's Exhibit #1 (photo) and Exhibit No. 2 (Photo) were admitted in evidence.

It is ordered that judgment be entered in favor of plaintiffs and against defendant as prayed.

Let a written judgment be prepared, signed and filed.

ARLINE M. FITZGERALD
OFFICIAL SUPERIOR COURT REPORTER
HALL OF JUSTICE - RECORDS
REDWOOD CITY, CALIFORNIA

CLERK'S TRANSCRIPT

JOHN A. PUTKEY
Attorney at Law
6767 Mission Street
Daly City, California 94014

Telephone: 755-1616

(ENDORSED)
FILED
JUN 10 1970
MARVIN CHURCH, County Clerk
By MADELINE JOHANSON
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF SAN MATEO

CECIL E. POPE and MARGARET S. POPE, his wife,

Plaintiffs,

vs.

BLANCHE DAVID, et al.,

Defendants.

NO. 148707

JUDGMENT

The above entitled matter coming on regularly to be heard on the 2nd day of April, 1970, plaintiffs appearing in person and by their attorney, John A. Putkey, Esq., and no appearance having been made by the defendant BLANCHE DAVID, and it appearing that said defendant BLANCHE DAVID was served with a copy of the summons and complaint in this action and that the default of the defendant BLANCHE DAVID was duly entered herein, and testimony having been taken and evidence introduced, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the defendant BLANCHE DAVID, her agents, servants and employees shall be, and they are hereby permanently enjoined and restrained from causing rain waters from their property to be discharged on the property of the plaintiffs.

2. That plaintiffs have judgment against defendant BLANCHE DAVID in the sum of Five Thousand ($5,000.00) Dollars as and for damage to their real property.

(TITLE OF COURT AND CAUSE)

(ENDORSED)

(E)

F I L E D
JUNE 10, 1970
MARVIN CHURCH, COUNTY CLERK
BY /s/ Madeline Johanson
Deputy Clerk

JUDGMENT

The above entitled matter coming on regularly to be heard on the 2nd day of April, 1970, plaintiffs appearing in person and by their attorney, John A. Putkey, Esq., and no appearance having been made by the defendant BLANCHE DAVID, and it appearing that said defendant BLANCHE DAVID was served with a copy of the summons and complaint in this action and that the default of the defendant BLANCHE DAVID was duly entered herein, and testimony having been taken and evidence introduced, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the defendant BLANCHE DAVID, her agents, servants and employees shall be, and they are hereby permanently enjoined and restrained from causing rain waters from their property to be discharged on the property of the plaintiffs.

2. That plaintiffs have judgment against defendant BLANCHE DAVID in the sum of Five Thousand ($5,000.00) Dollars as and for damage to their real property.

3. That plaintiff CECIL E. POPE have judgment against defendant BLANCHE DAVID in the sum of One Thousand ($1,000.00) Dollars as and for mental anguish.

5. For costs of suit herein in the sum of $75.00.

DATED: This 8th day of June, 1970.

/s/ Frank H. Rose
JUDGE OF THE SUPERIOR COURT

(ENT. JUNE 10, 1970, VOL. 371, PAGE 88.)

34

(TITLE OF COURT AND CAUSE)

(ENDORSED)

(E)

FILED
JUNE 10, 1970
MARVIN CHURCH, COUNTY CLERK
BY /s/ Madeline Johanson
Deputy Clerk

MEMORANDUM OF COSTS

Clerk's Fees	$30.00
Sheriff's Fees - Bench Warrant	11.40
Service of Summons	10.00
Service of Writ of Injunction Pendente Lite	12.50
Service of Order re: Contempt	8.50
Certified copies	3.20
TOTAL	$75.60

JOHN A. PUTKEY, being first duly sworn, deposes and says:

That I am the attorney for the plaintiffs, the parties who claim costs herein; that to the best of my knowledge and belief the items of costs in the within Memorandum are true and correct and have been necessarily incurred in said cause.

/s/ John A. Putkey
JOHN A. PUTKEY
Attorney for Plaintiffs

Subscribed and sworn to before me this 2nd day of June, 1970.

/s/ Maryann Collier
Notary Public in and for the County of San Mateo, State of California. My commission expires December 12, 1972.

35

(TITLE OF COURT AND CAUSE)

(ENDORSED)

(E)

(INDEXED)

FILED
OCTOBER 29, 1970
MARVIN CHURCH, COUNTY CLERK
By /s/ Lorraine L. Moura
Deputy Clerk

Good cause appearing therefor, it is hereby ordered that the defendant WALTER DAWYDIAK sued herein as FIRST DOE may have to and including the 20th day of November, 1970, within which to demur, answer, plead or otherwise move to the complaint on file.

Dated October 29, 1970.

15 days heretofore by stipulation of counsel.
0 days heretofore by order of court.

/s/ Melvin E. Cohn
JUDGE

MINUTES CIVIL AND CRIMINAL, DEPARTMENT NO. 3, VOLUME 196, PAGE 394

(TITLE OF COURT)

DECEMBER 29, 1970 Present: HON. FRANK W. ROSE, Judge
Arline M. Fitzgerald, CSR
Irene Ford, Clerk
Vasto Sardo, Bailiff

(TITLE OF CAUSE)

MOTION FOR ORDER VACATING THE ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT OF NOVEMBER 30, 1970, AND FOR AN ORDER ALLOWING DEFENDANT TO FILE AN ANSWER TO THE COMPLAINT

John A. Putkey, Esq., attorney for plaintiffs

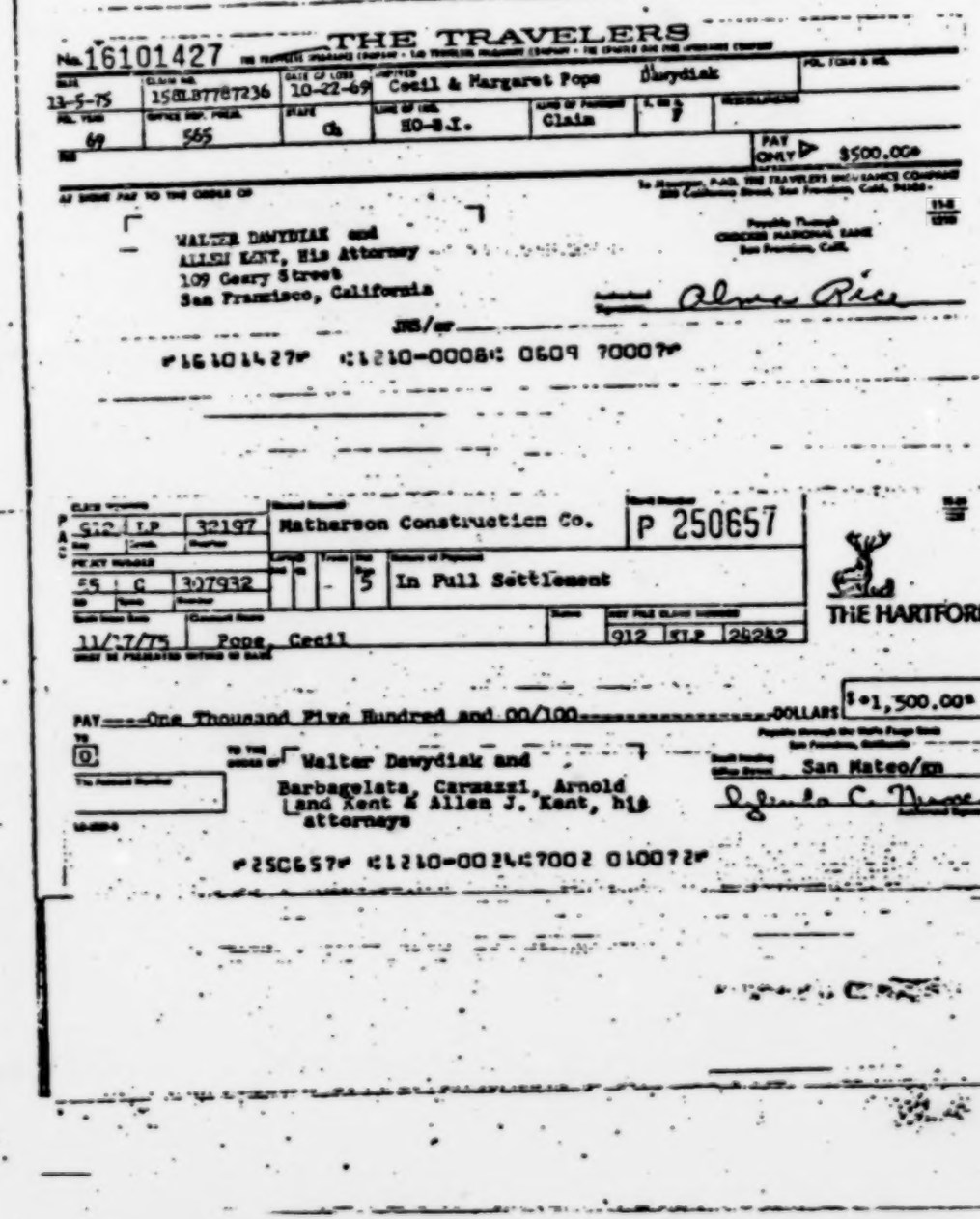
Joseph Jedeikin, Esq., attorney for defendants (moving party)

Arguments were made to the Court by respective counsel.

It is Ordered that the motion is denied.

ARLINE M. FITZGERALD
OFFICIAL SUPERIOR COURT REPORTER
HALL OF JUSTICE - RECORDS
REDWOOD CITY, CALIFORNIA

APPENDIX G



THE TRAVELERS

No. 16101427

11-5-75	15ELB7787236	10-22-69	Cecil & Margaret Pope	Dawydiak		
69	565	Ca	SO-S.J.	Claim	7	

PAY ONLY ▷ $500.00

WALTER DAWYDIAK and
ALLEN KENT, His Attorney
109 Geary Street
San Francisco, California

Payable Through CROCKER NATIONAL BANK San Francisco, Calif.

Authorized Signature Alma Rice

JHS/ep

#16101427# :1210-0008: 0609 700079#

THE HARTFORD

912	LP	32197	Matherson Construction Co.	P 250657
55	C	307932	In Full Settlement	
11/7/75	Pope, Cecil		912	LP 28282

PAY ---One Thousand Five Hundred and 00/100--- DOLLARS $*1,500.00*

TO THE ORDER OF Walter Dawydiak and Barbagelata, Carnazzi, Arnold and Kent & Allen J. Kent, his attorneys

Payable through the Wells Fargo Bank San Francisco, California

San Mateo/sm

Authorized Signature

#250657# :1210-0024: 7002 0100 72#

APPENDIX H

Page 1 - "The Advance-Star" Wed., Aug. 16, 1972

$240,000 'landslides' settlement

A $240,000 settlement of a lawsuit involving five homes in the Mills Estate section of Burlingame, damaged by landslide problems in January, 1969, was announced yesterday by Bocci and Modena, South San Francisco law firm.

The case had been scheduled to go to trial in San Mateo County Superior Court on Aug. 7.

In addition to the cash settlement, the agreement specifies that the homes, located between Tiburon Way and Rivera Drive, will be repaired.

Defendants were Treaddale Constructica Co.; Tecon Corp.; Dames and Moore soil engineers; Matherson Constructica Co.; Wilsey, Ham and Blair civil engineers, and Irving Cabral, Builders.

Plaintiffs were Walter Dawydiak, 2828 Tiburon Way; Dr. and Mrs. Irving Merrill, 2829 Rivera Drive; Dr. and Mrs. Maurice Brown, 2818 Tiburon Way; James Frew, 2841 Rivera Drive, and Mrs. William Stangel, 2833 Rivera Drive.

Page 4 -"Recorder-Progress" Burlingame Edition - Sat., Aug. 19, 1972

Homeowners win slide settlements

A $240,000 landslide damage suit settlement, awarded seven Burlingame homeowners, ends a three-year-old lawsuit against builders of the homes along Tiburon Way and Rivera Drive in the Mills Estate section of Burlingame.

Sharing the settlement will be seven plaintiffs, Walter Dawydiak, 2828 Tiburon Way; Dr. and Mrs. Irving Merrill, 2829 Rivera Drive; Dr. and Mrs. Maurice Brown, 2818 Tiburon Way; James Frew, 2841 Rivera Drive; and Mrs. William Stangel, 2833 Rivera Drive.

Paying the agreed sum will be the defendants, Treadale Construction Company, Tecon Corporation, Dames & Moore soils engineers, Matterson Construction, Wilsey, Ham & Blair engineers, and Irving Cabral builders.

The settlement includes repair of the plaintiffs' properties between Tiburon Way and Rivera Drive in the steeply sloping area.

The case had been filed by attorneys Bocci and Modena of South San Francisco, after the homeowners suffered landslide damage to their properties in January, 1969.

Page 1 - "The Leader" Burlingame Edition - Wed., August 23, 1972

Settlement Reached In Landslide Suit

Seven Burlingame homeowners in the Mills Estate who were hit by massive land movements beginning in January, 1969, agreed to an out-of-court settlement amounting to $240,000 last week.

The agreement, which ends a three-year-old lawsuit, was reached before the beginning of the trial set for August 7, according to attorneys for the plaintiffs, Bocci & Modena of South San Francisco.

The plaintiffs included Walter Dawydiak of 2828 Tiburon Way; Dr. and Mrs. Irving Merrill of 2829 Riverar Drive; Dr. and Mrs. Maurice Brown of 2818 Tiburon Way; James Frew of 2841 Rivera; and Mrs. William Stangel of 2833 Rivera Drive.

Agreeing to share in the payment of the settlement were Wilsey, Ham & Blair, engineers; Treasdale Construction Company; Tecon Corporation; Dames & Moore, soils engineers; Matherson Construction Company; and Irving Cabral Builders.

According to Bocci & Modena, the settlement includes repairs to the plaintiffs' properties.

(TITLE OF COURT AND CAUSE)

(ENDORSED)

(E)

FILED
NOVEMBER 12, 1970
MARVIN CHURCH, COUNTY CLERK
BY /s/ Alta Dunlop
Deputy Clerk

DECLARATION OF JOSEPH JEDEIKIN IN SUPPORT OF MOTION TO SET ASIDE DEFAULT

JOSEPH JEDEIKIN declares the following to be true and correct under penalty of perjury:

I am the attorney for moving defendant BLANCHE DAVID.

The within judgment against BLANCHE DAVID is based on the hearing before Judge Rose on April 2, 1970. Following is a partial transcript (p. 2) of the hearing:

The Court: "You have the return of service on Blanche David, November 3rd. Is she the only defendant involved?"

Mr. Putkey: "She is the only defendant."

The Court: "And I see the default has been entered. All right."

Mr. Putkey (to Mr. Pope, p. 3, line 7):

"The defendant is the owner of the real property which is adjacent to your house at 2826 Tiburon Way?"

Mr. Pope: "That's right".

The above testimony formed the basis of the judgment against Blanche David, who is not the owner of the property, as evidenced by the supporting declarations on file herein and

ARLINE M FITZGERALD
OFFICIAL SUPERIOR COURT REPORTER
HALL OF JUSTICE - RECORDS
REDWOOD CITY CALIFORNIA

as conceded by the plaintiffs in their present attempt to proceed against the true owner, WALTER DAWYDIAK, as a DOE. The judgment was therefore based on "extrinsic" fraud or mistake, and for equitable reasons alone, should be set aside. Leaving the judgment stand would constitute an adjudication of Blance David as an owner, which is not a fact. It would make it difficult, if not impossible, for the Court to proceed against the fictitious defendant under the "One Final Judgment Rule (3 Witkin Procedure, p. 1887, Mirabile v. Smith, 119 C.A.2d, p. 685.)

The declaration of Blanche David states she had no notice of this litigation. She wrote to her attorney representing her in the personal injury case she is involved in on November 5th, 1969, and if she had been served with summons and complaint, she obviously would have mailed such process to him.

Plaintiffs failed to comply with Code of Civil Procedure Section 587. The declaration of mailing does not state the date when the notice of application for default was supposedly mailed and who mailed it, contrary to the section, which states: (inter alia)

> "An application ... for entry of default ... shall include an affidavit by the plaintiff or his attorney stating that a copy of such application has been mailed . . . and the DATE ON WHICH SUCH COPY WAS MAILED . . ."

> . . . "No application for judgment shall be heard . . . and no default shall be entered ... unless such affidavit is filed . . . . ."

Executed under penalty of perjury at San Francisco, California, this 10th day of November, 1970.

/s/ Joseph Jedelkin

JOSEPH JEDELKIN

REDWOOD CITY, CALIFORNIA MONDAY, NOVEMBER 30, 1970

PROCEEDINGS

THE CLERK: Case No. 148707, Pope versus David.

MR. JEDEIKIN: That's ready.

MR. PUTKEY: That's ready for the plaintiff.

THE COURT: I have taken the time since you got here to read the declarations and moving papers, so I have that. All right. You may proceed.

MR. JEDEIKIN: Thank you. Your Honor has read the moving papers. One of the important points, I think, in this matter is the fact that this is an action against -- by a neighbor -- against a property owner and a person who was named and served and against whom a default judgment was obtained, Miss Blanche David, who is in court here today, is not the owner of this property. So that if nothing else happens, I think Your Honor should be aware of the fact that this, in itself, is an inequity because the nature of the action is of the type that proceeding against the owner of the property, asking the owner to make certain corrections in connection with a drainage flow and damages as a result of having inadequate drainage provisions, under the law, only the property owner would be able to respond to this type of complaint and, as I said, Miss David is not the owner.

There is a declaration, two declarations, on file that say she is not the owner. There is no counter-declaration and, in fact, Mr. Putkey learned of the fact that Miss David is not the

owner sometime in the last summer. He caused Mr. Dawydiak, the defendant David's brother, to be served as First Doe, and that action, in causing him to be served, resulted in Miss David learning of the fact that a judgment was pending against her, and I think Your Honor is probably familiar with some of these procedures, proceedings, rather, because there has been some correspondence in the file. There are two letters in the file by Miss David, addressed to Your Honor: one in July and one in September, and there is --

THE COURT: Yes, the July letter didn't receive a reply because it didn't indicate what she was talking about. Some altercation with Mr. Pope, but that didn't mean anything to me, didn't relate to anything I knew about.

MR. JEDEIKIN: I see. In other words, what I ask, was the July letter placed in this file? Did Your Honor associate it with this file?

THE COURT: Yes. I received it. I looked at it, tried to recall. I asked my clerk to recall if we had anything that this related to. We couldn't think of anything, and I didn't have the time to do research. She could have done it herself, if she wanted to.

MR. JEDEIKIN: All right. In any event, that letter, Miss David does make the reference that a Deputy Sheriff had, or a police officer, rather, had told her that a suit was pending.

THE COURT: That's right.

MR. JEDEIKIN: And she says, Your Honor, if there is such

an improper suit pending in your court, it should be dismissed as I have no time --

THE COURT: She should have looked it up.

MR. JEDEIKIN: Yes.

THE COURT: I am not arguing the merits as far as that is concerned.

MR. JEDEIKIN: No, that is a -- I mean, I am talking about her state of mind. I think the letter is evidence of her state of mind that she did not, she was not aware of the suit pending against her, which is the reason why she addressed Your Honor; and I think this is important in this case.

Now, there is also a jurisdictional basis upon which this motion is made and that is Section 587, which sets forth that in order to get a default judgment, plaintiff or his attorney must file a declaration of mailing which Mr. Putkey did. However, the section states that the date on which such copy was mailed must be a part of the declaration of mailing. And it goes on to say that no application for judgment shall be heard and no default shall be entered unless such affidavit is filed, and I suggest that the affidavit is defective for this reason, because it does not state at all when this application for entry of default was mailed to Miss David.

And I feel this is -- this goes to the jurisdiction and is not barred by any time provisions.

THE COURT: I don't recall -- the section doesn't specify any time period within which the mailing must have occurred,

(TITLE OF COURT AND CAUSE)

(ENDORSED)

(E)

FILED
DECEMBER 11, 1970
MARVIN CHURCH, COUNTY CLERK
BY /s/ Sue Hack
Deputy Clerk

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

BLANCHE DAVID declares the following to be true and correct under penalty of perjury:

I am the defendant, BLANCHE DAVID, in the above entitled action. In this action the plaintiffs are proceeding against me as the alleged owner of the real property located at 2826 Tiburon Way in Burlingame (Complaint, page 1, lines 29-31). The action is one for damages and injunction based on ownership of real property and liabilities arising out of ownership of real property. (Par. V of the complaint).

In truth and in fact I am not an owner of said property and never have been. The said property stands in the name of my brother, WALTER DAWYDIAK, who is the owner thereof. The Grant Deed of said property is marked Exhibit A, attached hereto and incorporated. I am informed and believe and thereon allege that the judgment in favor of plaintiff against me was based on testimony under oath by plaintiff, CECIL E. POPE, to the effect that I was the owner of said property. Such testimony was false and no judgment against me would have been authorized by the Court if the fact of such false testimony would have been called to the Court's attention at that time.

Reference is made to my declaration under penalty

of perjury in support of my motion to set aside default dated November 9, 1970, and on file in the above proceeding and consisting of 7 pages. Said declaration and each and every allegation thereof is incorporated by reference herein, as if set forth in full.

Executed at Burlingame, California, this 9th day of December, 1970.

/s/ Blanche David
BLANCHE DAVID

(PROOF OF SERVICE BY MAIL ATTACHED TO THE FOREGOING DOCUMENT.)

VOL 3619 PAGE 110 SM 30576 284639 rmn

Grant Deed

(CORPORATION)

MATHERSON CONSTRUCTION INC., a Corporation

a corporation organized under the laws of the State of

does hereby **Grant to**

WALTER DAWYDIAK, a single man

the real property situated in the City of Burlingame County of San Mateo, State of California, described as follows:

Lot 11, Block 32, as designated on the map entitled "MILLS ESTATE NO. 11 BURLINGAME SAN MATEO COUNTY, CALIFORNIA", which map was filed in the office of the Recorder of the County of San Mateo, State of California on December 3, 1956 in Book 46 of Maps at pages 35 and 36.

CANCELLED 126067 I.R.S. 37.95

In Witness Whereof said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its duly authorized officers.

Dated: June 11, 1959

MATHERSON CONSTRUCTION INC.

By John W. Matherson Pres.

By Dorothy F. Matherson Sec.

STATE OF CALIFORNIA
COUNTY OF San Mateo } ss.

On June 11, 1959 before me, Maxine E. Brown, a Notary Public in and for said County and State, personally appeared JOHN W. MATHERSON known to me to be the President, and DOROTHY F. MATHERSON known to me to be the Secretary of the corporation that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same pursuant to its by-laws or a resolution of its board of directors.

(Seal) Maxine E. Brown
Notary Public

My Commission Expires: My Commission Expires Aug. 29, 1960.

Return to:
Address:
Application No.:

RECORDING DATA

VOL 3619 PAGE 110

58272R

RECORDED AT REQUEST OF

CALIFORNIA PACIFIC TITLE INSURANCE CO.

JUN 12 2 27 PM 1959

OFFICIAL RECORDS
SAN MATEO COUNTY
Ruth Kiss
RECORDER

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Compared ___ Kentrow

California Pacific Title Insurance Company

have granted equity relief, and I think our case here is in a much stronger position, not on the default, about inequitable grounds.

Miss David really doesn't belong in the lawsuit, for the reason that she is not the owner; and at this time we have filed her affidavit, Your Honor, and we have attached to that affidavit the title deed. There has been no opposing affidavit. Walter Dawydiak is the owner and not Miss David. And there are case after case after case, Your Honor, that says the Superior Court does have the power to do equity; and there is one case that I have cited at the conclusion of my own affidavit. It is the Nicholls versus Anders case, where plaintiff took a default judgment against the partnership. Later on there was a trial against partners which was in favor of the partners; and though it was eight months later, the court voided the judgment against the partnership on the grounds that it had jurisdiction there to do equity and you've got a similar situation here. You can't get away from it. You don't have a partnership here, but we have got to two defendants and one is the wrong party in a lawsuit.

But, even though the six months have gone by, I feel, Your Honor, that both on the law, Your Honor has authorization and jurisdiction to grant relief and on equity, certainly Your Honor has jurisdiction to grant relief.

MR. PUTKEY: In the first place, Your Honor, I think that Mr. Jedeikin is using this motion to reargue the motion which

THE COURT: The default hearing.

MR. JEDEIKIN: Well, but it was -- wasn't a motion, in any event. It was a default hearing and, as I said, under the case, under the cases, there are some default judgments where motions for new trials have been granted.

Now, Mr. Putkey said nothing about the ownership of the property. I just -- I am just at a loss to understand how -- he knows better because not only is he proceeding against Mr. Dawydiak, but last week, even though he knew I was his attorney, he attempted to have a default entered against Mr. Dawydiak, and, fortunately, his request to enter a default was not filed in time and a demurrer for Mr. Dawydiak was filed, but it just seems incomprehensible to me how an attorney can proceed wanting to enforce a judgment which he knows is inequitable.

MR. PUTKEY: I am not aware of that fact at all. All I know -- well, I am not going to argue that point at all. I don't think that that --

THE COURT: We are not here on enforcement of a judgment but on a motion -- call it a motion for a new trial following a previous motion under Section 473 or 473a to vacate a judgment, which motion was denied.

At that time in denying that motion, I expressed the view that the Court was not free to give consideration to equitable considerations that were urged. Counsel drew the Court's attention at that time to the case of Olivera versus Grace, in urging that it was appropriate; and having considered that

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REDWOOD CITY, CALIFORNIA

spite the voluminous pleadings on this point, Blanche David has not even come close to presenting it.[10]

Although it is true that, under the laws of this State, failure to join an indispensable party to a lawsuit voids a Court of subject matter jurisdiction, Blanche David has failed to cite authority for the proposition that the "true owner" (allegedly her brother, Walter Dawydiak) as opposed to the pleaded owner, if such can be determined, is an indispensable party to the type of lawsuit brought by the Popes against her.

It is these appellees' contention that under the laws of the State of California, Blanche David's brother, Walter Dawydiak, is not a "indispensable party" and the failure to join him as an indispensable party did not void the State Trial Court of subject matter jurisdiction over the lawsuit. The Popes' action against Blanche David for injury to their real property and and for mental suffering stemming from this damage was primarily an action for tort. It is clear that appellees' pleadings in the original State Court action allege that Blanche David and Does One through Three are co-tortfeasors. It is well settled in this State that in an action against one tort feasor, additional tort feasors are neither indispensable nor necessary parties. *People by and through Department of Public Works v. Clausen* (1967) 248 C.A.2d 770, 57 Cal.Rptr. 227; *Tracy v.*

[10]Appellees note that if this question and the previous one dealing with service of process present questions of State rather than Federal law, Blanche David could not present her claims to the Federal District Court since she can only invoke its jurisdiction on some theory of Federal Question Jurisdiction.

Brecht (1935) 3 C.A.2d 105, 39 P.2d 498. Additionally, it is well settled that in suits similar to that brought by the Popes against Blanche David to abate a nuisance on a property, the owner of the property is not an indispensable party. *People v. Superior Court* (1969) 1 C.A.3d 167, 81 Cal.Rptr. 555; *Sherwood v. Ahart* (1917) 35 C.A. 84, 169 P. 240.

Under California law, the legal effect of a default judgment is to confess the truth of all the allegations of each cause of action in a complaint. *Robinson v. Early* (1967) 248 C.A.2d 19, 56 Cal.Rptr. 183; *Title Insurance and Trust Company v. King Land and Improvement Company* (1912) 162 C. 44, 120 P. 1066. Therefore, by allowing the entry of a default and a subsequent default judgment, Blanche David has admitted the allegations of the underlying complaint; to wit, that she is a co-owner of the property in question from which water was draining onto the property of the appellees, Cecil and Margaret Pope. (Clerk's Transcript page 22).

Furthermore, since the initiation of the lawsuit by the Popes against Blanche David, Walter Dawydiak, whom Blanche David alleges is the true owner of the property adjoining that of the Popes, has been served as First Doe and the Popes' action as to him is still in progress. Under California law, it is perfectly proper to sue several co-defendants, take a default judgment against one defendant, and proceed against the remaining defendants. California Code of Civil Procedure, Sections 579 and 583; *Cole v. Rochling Construction Company* (1909) 156 C. 443, 105 P. 255; *Mirabile v. Smith* (1953) 119 C.A.2d 685, 260 P.2d 179.

Therefore, appellees respectfully submit that the jurisdictional questions, if any, presented by the failure to immediately serve Blanche David's brother, Walter Dawydiak, are jurisdictional only as to matters of State rather than Federal law. Secondly, Walter Dawydiak was not an indispensible party to the State Court action. Thirdly, whether or not he is "indispensible". He has been joined to the lawsuit. Lastly Blanche David has waived this error by failing to make timely objection.

CONCLUSION

In conclusion, these appellees, Cecil E. Pope and Margaret S. Pope, respectfully submit as follows: (1) The United States District Court for the Northern District of California did not have jurisdiction to hear Blanche David's lawsuit, challenging the validity of the State Court judgment rendered against her; (2) The Supreme Court of the United States is the only Federal Court empowered to hear the type of action brought by Blanche David; (3) If the United States District Court for the Northern District of California could, under some theory of Federal question jurisdiction, entertain Blanche David's lawsuit below, Blanche David in reality presents questions of State, rather than Federal, law or questions of fact rather than law; (4) Blanche David has lost her Federal claims by failing to present them in the State Court proceedings; (5) Blanche David's assignments of error concerning the defective service of process upon her are frivolous,

fail to raise Federal questions, and their use as a basis for collateral attack is barred by principles of res judicata and collateral estoppel; (6) Blanche David's brother, Walter Dawydiak, was not an indispensable party to the lawsuit brought by the Popes against Blanche David for damage to their land caused by drainage of water from adjoining real property, San Mateo Superior Court Number 148707; (7) Nevertheless, Blanche David's brother, Walter Dawydiak, has been properly joined under the laws of the State of California, as a party to the above lawsuit, and the proceedings are still continuing as to the Popes' action against him.

Wherefore, under the above described premises and the above discussed law, these appellees, Cecil E. Pope and Margaret S. Pope, respectfully submit that the United States District Court for the Northern District of California's order dismissing Blanche David's lawsuit against them be affirmed and this appeal be dismissed.

Dated, Redwood City, California,
March 21, 1975.

Respectfully submitted,
OWEN, MELBYE & ROHLF,
By RICHARD B. MELBYE,
Attorneys for Appellees
Cecil E. Pope and Margaret S. Pope.

(Appendices Follow)

MINUTES CIVIL AND CRIMINAL, DEPARTMENT NO. 3, VOLUME 196, PAGE 371

(TITLE OF COURT)

NOVEMBER 30, 1970 Present: HON. FRANK W. ROSE, Judge
Arline M. Fitzgerald, CSR
Irene L. Ford, Clerk
Vasto Sardi, Bailiff

(TITLE OF CAUSE)

MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT AND FOR LEAVE TO DEFEND ACTION:

John A. Putkey, Esq., attorney for plaintiff

Joseph Jedeikin, Esq., attorney for Defendants (moving party)

Arguments were made to the Court by Mr. Jedeikin and Mr. Putkey, respectively.

Blanche A. David was sworn and testified on behalf of defendants.

It is ordered that the motion is denied. Let a written order be prepared, signed and filed.

ARLINE M. FITZGERALD
OFFICIAL SUPERIOR COURT REPORTER
HALL OF JUSTICE - RECORDS
REDWOOD CITY, CALIFORNIA

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CECIL POPE and MARGARET POPE,

Plaintiffs and Respondents,

v.

BLANCHE DAVID,

Defendant and Appellant.

1 Civil 30303

(Sup. Ct. # 148707)

Defendant Blanche David appeals from: (1) a default judgment entered against her in favor of plaintiffs Cecil E. Pope and Margaret S. Pope, (2) an order denying her motion to set aside the judgment and the default on which it was based, and (3) an order denying her motion for a new trial "and for alternative relief."

The appeal from the default judgment

The default judgment was entered June 10, 1970. The notice of appeal from that judgment was filed April 29, 1971, more than 180 days after its entry.

Rule 2(a) of California Rules of Court provides: "Except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days after the date of mailing notice of entry

of judgment by the clerk of the court pursuant to section 664.5 of the Code of Civil Procedure, or within 60 days after the date of service of written notice of entry of judgment by any party upon the party filing the notice of appeal, or within 180 days after the date of entry of the judgment, whichever is earliest, unless the time is extended as provided in rule 3. (Emphasis added.)

The time for filing defendant's notice of appeal was not extended by rule 3, or otherwise. Since, "Timely filing of a notice of appeal is a jurisdictional matter" (Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc., 66 Cal.2d 782,787), her appeal from the default judgment will be dismissed.

The appeal from the order denying the motion to set aside the default and the default judgment

The motion, according to the written notice of motion, was "based upon the provisions of California Code of Civil Procedure, section 473a, [and] on equitable considerations . . . ." At the hearing on the motion, November 30, 1970, defendant's attorney stated: "We are making our motion on a number of sections and specifically [section 473.5] that was effective as of July 1, 1970." We accordingly consider the application to the case, and to this appeal, of section 473a, section 473.5, and the well-known section 473, of the Code of Civil Procedure.

Section 473 was clearly inapplicable to defendant's proceedings. That statute permits commencement of proceedings for relief from default within six months of the "entry of the default."

It is the time of entry of the default, not that of the entry of the default judgment, which controls. (See Nemeth v. Trumbull, 220 Cal.App.2d 788, 791-792; Koski v. U-Haul Co., 212 Cal.App. 2d 640, 642-643.) Here the default of defendant was entered almost a year before her proceedings for relief were started. The superior court was without jurisdiction under section 473 to grant the motion. (Davies v. Superior Court, 228 Cal.App.2d 535, 538-540; Jones v. Alexander, 101 Cal.App.2d 44, 46; 5 Witkin, Cal. Procedure (2d ed.), p. 3725.)

We also find Code of Civil Procedure section 473.5 specially relied upon by defendant at the hearing, to be inapposite. That section was added to the code by Statutes of 1969, chapter 1610. Although ordinarily it became effective as of July 1, 1970, the statute provided: "In any action commenced prior to July 1, 1970, in which a default or default judgment was entered prior to July 1, 1970, the law in effect prior to July 1, 1970, shall govern the right to seek relief." (Stats. 1969, ch. 1610, §§ 23, 30, pp. 3373, 3375.)

Plaintiffs' action was commenced, and the subject default and default judgment were entered prior to July 1, 1970.

Code of Civil Procedure section 473a, substantially the predecessor statute to section 473.5 was "in effect prior to July 1, 1970." It therefore governed defendant's "right to seek relief." Section 473a, as relevant here, provided: "When from any cause the summons in an action has not been personally

served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." If defendant was entitled to statutory relief it was necessarily under section 473a, which as we have pointed out was specifically relied upon in her notice of motion.

The immediate issue then, is whether summons in the action had "been personally served on the defendant." The superior court concluded that summons had been so served. It remains to be seen whether this conclusion was supported by substantial evidence. (For a statement of the "substantial evidence" rule, see Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc., 66 Cal.2d 782, 784-785.)

A declaration under penalty of perjury of a process server, as relevant, stated: "That prior to November 3, 1969, I was instructed to serve a copy of the summons, complaint, order to show cause and points and authorities in the above matter on one Blanche David. That on November 3, 1969, I went to 2826 Tiburon Way, Burlingame, California, the address given to me as the residence of Blanche David. That I arrived at this residence about 8:00 o'clock p.m. and when I arrived at this address the porch light was on. I rang the doorbell and the door was opened by a lady who fitted the description which was given to me as the description of Blanche David; that this description was that

Blanche David was: blond hair, medium build, 40 years of age, 5'5". That I asked this lady if she was Blanche David and she replied, "No"; that Blanche David was dead; that I then told her that she seemed to fit the description of Blanche David and I stated, 'You are Blanche David .' That I started to give her the papers I was to serve on her and this lady slammed the door in my face; that I then told this lady in a loud voice you are served and I then placed copies of the summons, complaint, order to show cause and points and authorities on the threshold of the door."

The remaining evidence on the question is found in defendant's declaration under penalty of perjury, which stated: "On November 3, 1969, at about 9:00 or 9:20 p.m., the front door bell rang. I went to the front door, turned on the porch light and looking through a peek hole I saw a stranger, a young woman, standing there. Without opening the door I asked her who she was and she said: 'Is Mrs. David home?' Since I am Miss David and my mother, known as Mrs. David, had died a few years previously, I replied that she was not home and had died. Thereafter, I turned off the porch light and returned to the interior of my home. I never opened the door that evening, as I never do so at nighttime, living alone in this house with my brother, who is an invalid. I previously lived in New York City and acquired the habit of keeping my door locked and not opening it to strangers through many years of residence in that city. I do not use the

front door to enter and depart from my home, since I drive the car out of the garage and use the automatic electric garage opening device. There were no legal papers left at the front door or the mail box that evening or any time thereafter, as I never saw any such papers at any time (until September 1970), none were given to me, nor was my attention called to such papers by anyone entering or leaving the residence on the day or days following November 3, 1969 (until September 1970)."

The applicable rule is found in Crescendo Corp. v. Shelted, Inc., 267 Cal.App.2d 209, 212, where quoting 40 California Jurisprudence (2d), page 66, the court stated: "Personal service usually contemplates actual delivery. But the person on whom service is sought may not, by merely declining to take the document offered, deny the personal service on the ground of lack of delivery, where under the circumstances it would be obvious to a reasonable person that a personal service was being attempted. In such a case the service may be made by merely depositing the process in some appropriate place where it would be most likely to come to the attention of the person being served." See also Trujillo v. Trujillo, 71 Cal.App.2d 257, 259-260; In re Ball, 2 Cal.App.2d 578.

In Trujillo v. Trujillo, supra, page 260, it is said: "Upon motion, under sections 473 and 473a of the Code of Civil Procedure, to set aside an interlocutory decree of divorce or a final judgment, where the evidence is conflicting, the court has

a sound discretion to grant or deny the motion, and in the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal therefrom. . . ."

In the instant action the superior court found that the defendant had been personally served with copies of the summons and complaint. Although the evidence was in conflict, under the authority of Crescendo Corporation v. Shelted, Inc., supra, Trujillo v. Trujillo, supra, and In re Ball, supra, there was substantial evidence in support of the superior court's determination.

Neither error nor abuse of discretion attended the superior court's denial of defendant's motion on the asserted statutory grounds.

Defendant raises a new and related issue for the first time on this appeal. It concerns plaintiffs' affidavit, required by Code of Civil Procedure section 587, attesting their mailing to defendant of a copy of the request to enter defendant's default. The record is not before us, but defendant asserts that it does not state the date on which the paper was mailed. Points urged for the first time on appeal will not be considered by a reviewing court. (Reimel v. Alcoholic Bev. etc. Appeals Bd., 256 Cal.App.2d 158, 176.) The same rule applies to argument concerning matters not shown by the record. (Weller v. Chavarria, 233 Cal.App.2d 234, 246.) We observe, however, that the questioned affidavit, dated November 21, 1969, necessarily indicates the

mailing occurred on or before that date, while the default, as previously indicated, was entered November 26, 1969. No contention is made that a mailing on or before November 21, 1969, would have been insufficient. In any event no prejudice is seen.

The appeal from the order denying motion for a new trial and for alternative relief

Following the denial of defendant's motion to set aside the default and default judgment she moved: (1) for a new trial pursuant to Code of Civil Procedure sections 657, 658 and 660, (2) to vacate, pursuant to Code of Civil Procedure sections 662, 663, and 663a, the order denying relief from her default, and (3) for leave "to file an answer to the complaint in the furtherance of justice and equity." All motions were denied.

An order denying a new trial is not appealable. (Code Civ. Proc., § 904.1, formerly § 963; Rodriguez v. Barnett, 52 Cal.2d 154, 156.) Insofar as the instant appeal is taken from the order denying a new trial, it may not be considered by us.

For the reasons pointed out in our consideration of the appeal from the order denying relief from the default, we find no merit in the appeal from the order refusing to vacate that earlier order.

The superior court treated defendant's motion for leave "to file an answer to the complaint in the furtherance of justice and equity," as an application for reconsideration, on equitable grounds as permitted by Bloniarz v. Roloson, 70 Cal.2d 143, 146-

147; and Weitz v. Yankosky, 63 Cal.2d 849, 855, of its earlier decision on the default.

After consideration of the equitable aspects of the case the court concluded "that the equities argued were not established" and that defendant "was not appearing with clean hands or in good faith before the court in the representations that she made in support of the motion." The court then "affirm[ed] that denial of the motion was proper but on the broader grounds that I have now determined." The motion for "alternative relief" and "to file an answer to the complaint in the furtherance of justice and equity" was then denied.

We now consider on its merits the superior court's resolution of these equitable issues.

Bloniarz v. Roloson, supra, 70 Cal.2d 143, 146, holds that "A court of general jurisdiction has inherent equity power, aside from statutory authorization, to vacate and set aside default judgments obtained through extrinsic fraud or mistake" (emphasis added), and that this "power may be invoked by motion or by an independent action in equity. . . ." (See also Weitz v. Yankosky, supra, 63 Cal.2d 849, 855.)

The record before the superior court, and now before us, considered in a light most favorable to the disputed decision (see Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc., supra, 66 Cal.2d 782, 784-785), discloses the following.

Prior to the commencement of the action plaintiffs' attorney telephoned defendant; he introduced himself and started to explain the purpose of his call, whereupon defendant hung up the telephone. Thereafter the attorney wrote a letter to defendant in which among other things he pointed out the damage to his client's property, requested that she install proper drainage on her property, and stated that if the work was not done it would be necessary to take legal action. The work not being done another letter was written defendant suggesting that if "this matter is not worked out satisfactorily it will be necessary for Mr. and Mrs. Pope to take legal action." This letter was certified; a notice was left by the postman at defendant's home but the letter was never claimed. The complaint, summons and an order to show cause why a temporary restraining order should not issue were, as previously indicated, served upon defendant November 3, 1969. She did not appear in response to the order to show cause, nor did she otherwise timely appear in the action. Accordingly, a preliminary restraining order issued November 17, 1969, restraining discharge of rain waters on plaintiffs' property. The preliminary restraining order was served upon defendant, but it was not complied with. On January 23, 1970, an "Order to Show Cause re Contempt" was issued and served upon defendant. She did not appear on the date ordered the hearing was continued and plaintiffs' counsel was ordered to, and did, notify her by "letter of the continued date and of

the fact a warrant for arrest will be issued if she does not respond." Defendant did not respond to the continued date, so a bench warrant was issued, February 27, 1970, for her arrest; it was later returned by the sheriff's office, marked "Unable to Contact--Past Appearance Date of 3-18-70." Defendant's default was entered November 26, 1969. On or before November 21, 1969, as indicated, plaintiffs' attorney mailed a copy of the request to enter such default to defendant, who made no response thereto. As noted, the default judgment was entered June 10, 1970. The notice of motion to set aside the default and default judgment was filed November 12, 1970.

From the foregoing the superior court reasonably concluded (1) that neither extrinsic fraud nor extrinsic mistake attended the proceedings leading to the default judgment, (2) that "the equities argued were not established," and (3) that defendant did not appear before the court "with clean hands or in good faith." Accordingly, neither error nor abuse of discretion is seen in the superior court's resolution of the remaining equitable issues.

We have considered defendant's offer of proof that it is not she, but instead her brother, who owns the premises concerned in the litigation. And we have in mind the rule that where possible, reviewing courts are much more disposed to affirm orders where the result brings about a trial on the merits, than when a default judgment is allowed to stand. But, nevertheless,

"An order denying a motion to vacate a default judgment will not be reversed in the absence of a clear showing of an abuse of discretion by the trial court. . . ." (Crittenden v. Crittenden, 221 Cal.App.2d 299, 300.) Here, as we have pointed out, no abuse of discretion is found.

The order denying the motion to set aside the default and default judgment and for leave to defend the action, and the order denying the motion for a new trial and for alternative relief, are affirmed. The appeal from the judgment is dismissed.

Elkington, J.

WE CONCUR:

Molinari, P.J.

Sims, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

FILED

MAY 3 01975

Court of App. 1st App. Dist.
CLIFFORD C. PORTER, Clerk

BLANCHE DAVID,

Plaintiff and Appellant,

vs.

CECIL E. POPE, MARGARET S. POPE, and JOHN A. PUTKEY,

Defendants and Respondents.

1 Civil 34470

(Sup. Ct. No. 175973)

This is an appeal by Blanche David from a judgment of dismissal after the sustaining of demurrers to her complaint against respondents Cecil and Margaret Pope and their attorney, John A. Putkey. In her complaint appellant David sought damages for malicious prosecution, negligence, fraudulent misrepresentation and abuse of process.

In a prior action (1 Civil 30303), the Popes, represented by their attorney, Mr. Putkey, had obtained a default judgment against Blanche David enjoining the discharge of water onto the Popes' property from the adjoining property on which Blanche David lived and awarding damages in favor of the Popes in the amount of $7,000. Blanche David moved to set aside this default judgment and

for a new trial. These motions were denied and the appellate court held that the trial court did not err in refusing to set aside the default and that there was no abuse of discretion in the trial court's conclusion: "(1) that neither extrinsic fraud nor extrinsic mistake attended the proceedings leading to the default judgment, (2) that 'the equities argued were not established,' and (3) that defendant [Blanche David] did not appear before the court 'with clean hands or in good faith.'" (Pope v. David, 1 Civil 30303, filed Feb. 13, 1973, p. 11.)

The judgment in the first action (1 Civil 30303) became final and thereafter on May 25, 1973, Blanche David filed the complaint in the instant action setting forth seven causes of action against the Popes and their attorney, John Putkey. In the complaint it is alleged that Walter Dawydiak is the owner of the real property at 2826 Tiburon Way in Burlingame and has been since 1959. It is also alleged that Cecil Pope stated in court that Blanche David was the owner of the real property at 2826 Tiburon Way. In varying causes of action, it is alleged that Cecil Pope knew this statement to be false, that Cecil Pope could have known it to be false with the exercise of reasonable diligence, that John Putkey, when he prepared the original complaint, was careless and negligent in failing to ascertain that Blanche David was not the owner of the property, that John Putkey stated in court that he did not know whether Blanche David owned the property at a time when he did know that Blanche David did not own the property. Based upon these allegedly false statements, Blanche David attempts to state causesof action in fraud,

negligence, malicious prosecution and abuse of process against the Popes and their attorney.

It is argued by respondents that the decision in the first action (1 Civil 30303) is res judicata on the issue of who owned the property at 2826 Tiburon Way and that this nullifies the allegations in the present action that the Popes knew or should have known that Blanche David was not the owner. We do not agree.

"[I]n a new action on a different cause of action, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, i.e., it is conclusive on issues actually litigated between the parties in the former action." (4 Witkin, Cal. Procedure (2d ed.) § 148, p. 3293.) The effect of a judgment by default on collateral estoppel is not clear. (See 4 Witkin, Cal. Procedure (2d ed.) § 218 et seq.) Where the issue was not raised in the prior proceedings, however, the default is not conclusive. (English v. English (1937) 9 Cal.2d 358, 363-365.)

The gist of the first action in the case at hand was not determination of the ownership of the property but, rather, Blanche David's responsibility for damaging the property of a neighbor by a discharge of water. Although the ownership of the property was pleaded, fraud or negligence in making this allegation was, of course, not pleaded nor determined. Although the trial judge in refusing to set aside the default held that there was no extrinsic fraud or mistake, a review of the record in that action indicates that the only factual questions raised were with respect to service of process on Blanche David and her knowledge of the suit against her. Under the

reasoning of English v. English, supra, the principles of res judicata do not bar appellant from alleging respondents' negligence or fraud in misstating ownership of property.

Even assuming, however, that plaintiff is not barred by principles of res judicata from alleging that the Popes misrepresented the ownership of the property, it is concluded that this allegation does not give rise to a cause of action against the Popes. Appellant attempts to state a cause of action for fraudulent misrepresentation, negligent misrepresentation, malicious prosecution and abuse of process, all based upon the essential allegation that the Popes misrepresented the ownership of the property.

To succeed in stating a cause of action based on either intentional or negligent misrepresentation, plaintiff must show that she relied to her detriment upon the misrepresentation. It is clear that Blanche David did not rely in any way. In fact, she chose to ignore the misrepresentation and not answer the complaint. It is not sufficient to argue, as does plaintiff, that the court relied on the false statements.

Appellant cannot succeed in basing a cause of action for misrepresentation on the alleged misstatement of the ownership of property for the further basic reason that publications made in the course of a judicial proceeding are privileged under Civil Code section 47, subdivision 2.* The privilege is an absolute one,

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* Civil Code section 47, subdivision 2, provides:
"A privileged publication or broadcast is one made--
". . . . . .
"2. In any (1) legislative or (2) judicial proceeding,

protecting publications made with actual malice or with the intent to do harm and covers judges, attorneys and parties to private litigation. (See Rader v. Thrasher (1972) 22 Cal.App.3d 883, 887-888.) "Although the application thereof usually arises in the context of a defamation action, it is equally applicable to other actions, with the sole exception of an action for malicious prosecution." (Pettitt v. Levy (1972) 28 Cal.App.3d 484, 489.)

Appellant cannot state a cause of action for malicious prosecution which requires that the judicial proceeding terminate favorably for the plaintiff. (Jaffe v. Stone (1941) 18 Cal.2d 146, 149; Merron v. Title Guarantee & Trust Co. (1938) 27 Cal.App.2d 119, 121.)

She also cannot state a cause of action for abuse of process. (See Spellens v. Spellens (1957) 49 Cal.2d 210, 229, 231.) Nowhere does she allege that the Popes' complaint was designed to accomplish any purpose other than to enjoin the discharge of water and recover damages. The taking of the default and the opposition to the motions to set the judgment aside are all actions to accomplish the same purpose.

---

or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action."

We note that appellant takes the position that the reason the proceedings terminated unfavorably is entirely due to the misrepresentation as to the ownership of the property. Such argument ignores the proceedings as they occurred. Blanche David did not answer the complaint. Had she answered denying ownership, the complaint could have been amended naming the owner as one of the Does. The trial court held that Blanche David's failure to answer was not due to mistake or fraud and that she did not come into court for equitable relief with clean hands or in good faith. This determination was upheld by the appellate court.

We also conclude that appellant cannot state a cause of action against respondent Putkey. In the third cause of action, appellant alleges that respondent Putkey was negligent in not having a little search made or by some other means determining that Blanche David was not the owner of the property from which the water drained. Ordinarily, in actions against an attorney for negligence in performing his services, it is necessary to show that there existed the relationship of attorney and client, a relationship obviously nonexistent here. Even the extension of this rule to those intended to be benefitted (see Donald v. Garry (1971) 19 Cal.App.3d 769, 771) cannot apply here where the filing of the complaint can in no way be seen as done with the intention of benefitting Blanche David.

In the fourth cause of action, appellant apparently contends that she was damaged by attorney Putkey's statement in open court relative to his lack of knowledge as to her ownership of the property. Appellant contends this statement was made at a time when

Mr. Putkey knew as a fact that Blanche David did not own the property. As discussed above, the absolute privilege of Civil Code section 47, subdivision 2, would preclude any cause of action except malicious prosecution based upon deliberate misstatements of facts in the pleadings or elsewhere in the judicial proceedings.

Again, there can be no action for malicious prosecution or abuse of process for the reasons discussed in the causes of action against the Popes.

The judgment is affirmed.

Brown (H. C.), Acting P.J.

We concur:

Scott, J.

Devine, J.*

* Retired Presiding Justice of the Court of Appeal, assigned by the Chairman of the Judicial Council.

APPENDIX Q

Mick Jagger rocks calm of hallowed Oakland court

By Don Martinez

"Hey, guess who I heard is testifying here today?"

"Yeah, I know, I saw somebody who looked like him downstairs."

The weak rumors began to spread like wildfire throughout the Alameda County Courthouse in Oakland yesterday.

Crowds began to gather and excitement crackled in the usually hushed halls outside Department 20.

A somber Superior Judge Robert Kroninger was forced to send his bailiff out to quell the disturbance.

Those inside his court watched in awe as a thin, pale witness took the stand to answer the routine, preliminary questions:

Name—"Michael Philip Jagger."

Age—"32."

Occupation—"singer songwriter."

And so it was true.

Mick Jagger was indeed a superstar witness in a matter spawned out of the shattering Altamont Rolling Stones rock concert that left four dead among the 300,000 spectators who jammed the hastily-prepared event nearly six years ago.

Jagger, dressed in reasonably straight attire for a Stone (sky-blue waistcoat, black glossy trousers, bright striped shirt and light doeskinned loafers), spent most of the day testifying in an attempt to save $890,000.

That was the default judgment rendered in June 1974 by Judge George W. Phillips against the rock group in a suit filed by ranchers. The plaintiffs claimed they suffered extensive damages by the crowds who overran and trampled the real estate around the dusty racetrack on that fateful Dec. 6, 1969.

The ranchers originally asked for $900,000 in general and punitive damages.

Judge Phillips awarded them nearly $700,000 after the defendants failed to respond to the action filed in Feb. 1970.

But Jagger contended yesterday that he didn't know anything about the suit.

"I thought it was a bad joke when I got this strange phone call from an attorney last December about the judgment," he said. Further, Jagger charged that he never was legally served with the summons and complaint.

He filed a motion to set aside the default action, which would open the door to a full trial.

But Hayward attorney Robert Hannon, a former county supervisor representing the ranchers, claimed otherwise.

Hannon produced a process server whose testimony roundly contradicted the rock star about an incident at San Francisco airport on June 9, 1972.

Vivian Emanuel, a former policewoman and department store security guard, claimed she served Jagger with the summons aboard the Stones' airplane, only to be beaten by the rock star as she was hustled off the aircraft.

"I told him if he didn't stop hitting me, I would sue him myself," said Mrs. Emanuel, testifying that Jagger and members of his group threw the papers out of the plane onto the runway.

Jagger's story of the incident was different.

Sitting upright, legs crossed on the witness stand, sometimes biting his celebrated and ample lip or gnawing at his fingernails, Jagger gave this account:

"I was told this woman followed us from the concert hall (Winterland, scene of the Stones' 1972 concert in The City) and was absolutely frantic at getting autographs for her children..."

"She was led through the plane and asked me if I was Mick Jagger. When I said I was, she said she was serving me under the laws of the state of California and threw a bundle of papers at me, striking me on the chest...

"I reacted quickly. I slapped her and was immediately sorry I did that...The lady was led off the plane spilling papers down the aisle and onto the runway..."

MICK JAGGER MUGS FOR FANS AT COURT
But he's trying to save $690,000

Altamont was 'the most horrible event I've seen'

"I looked at the papers and saw they dealt with legal matters, but I didn't know which case."

Jagger testified earlier that in planning for the 1972 tour "we talked about coming to San Francisco because the previous time we played here (at Altamont) we went through the most horrible event I've ever seen—we didn't want to repeat it."

The singer admitted concern "for our physical well being, we never accepted that the things that happened were completely our fault."

The Stones knew of pending suits stemming from Altamont but "we were afraid. We talked about people serving papers and we decided to accept all summonses," Jagger continued.

A half-dozen personal injury suits arising from the concert have been or are being settled, attorneys said.

But Jagger took specific offense to the pending case.

"This could affect my reputation throughout the world. People will tend to think that I'm part of a group that owes nearly $700,000," he said. "I was aware of the other suits but this one came out of the woodwork."

At one point, Hannon said Jagger was "an elusive person who is hard to get hold of, one whose veracity can be questioned."

But Jagger's New York attorneys, Peter Parcher and William McCabe, indicated that it's a rather simple matter.

They introduced as evidence three Rolling Stones albums (Sticky Fingers, Goat's Head Soup and Exile on Main Street) that had the address of a New York record company that would have forwarded legal matters.

Further, they said agents, publishers and film producers working with the Stones could have been contacted.

Judge Kroninger said he would rule next Friday "without the necessity for further appearance."

Jagger, who kept busy chain-smoking and signing autographs during the brief recess, flashed a toothy grin at the end of the long day.

Asked if he had ever spent a full day in court before, Jagger shook his shaggy coiffure and said, "Are you kidding? Man, I've spent full days in jail before."

Page 4—S.F. Examiner ★★ Fri., Aug. 22, 1975

Mick Jagger as he appeared in Alameda court last week with an attorney, left. Yesterday a judge set aside a judgment against him.

Judgment for Jagger

By Don Martinez

Mick Jagger got "Satisfaction" in Alameda County Superior Court today.

Superior Judge Robert Kroninger set aside the $640,000 default judgment entered against Jagger and his Rolling Stones last year by another judge.

The rock superstar and his group failed to respond to a $900,000 suit filed by ranchers who claimed their grazing land around the Altamont Race Track was damaged by the crowd of 300,000 fans who swarmed to the ill-fated Dec. 6, 1969, Stones concert there.

Four persons died during the violence-marred concert. One was stabbed to death.

Jagger claimed he was unaware of the suit.

His lawyers said he was improperly served notice of the action by a woman process server who marched through his crowded charter plane as it was leaving San Francisco in June 1974 and hurled a bundle of legal papers at him.

Judge Kroninger agreed.

"The litigants are entitled to an opportunity to appear and be heard," he said.

The judge's decision paves the way for a full trial on the issue.

U.S. Judge May Find Hughes in Default For Failing to Appear for SEC Questions

By a Wall Street Journal Staff Reporter

WASHINGTON A federal judge appears ready to find Howard Hughes in default for failing to appear for questioning by Securities and Exchange Commission lawyers in connection with the agency's pending suit against the reclusive billionaire.

District Judge Alfonso J. Zirpoli, in San Francisco, also suggested that he would grant the SEC a preliminary injunction against Mr. Hughes. Presumably such an injunction would bar the same types of fraud and manipulation that the SEC, in its complaint of last March, alleged to have occurred during Mr. Hughes' 1968 take over of Air West.

Judge Zirpoli offered his comments during a Jan. 30 hearing in San Francisco, but they weren't confirmed here until Friday when a transcript of the proceedings arrived at the SEC's Washington headquarters.

SEC's Charges

In broad outline, the SEC is charging that Mr. Hughes conducted a comprehensive and devious campaign to persuade Air West shareholders to accept the Hughes offer for acquisition of the airline. The SEC contends that Hughes news releases gave the false impression that Air West shareholders would get $22 a share for their stock when, under terms of the purchase agreement, they actually have received only $8.75. Two Hughes companies and a half dozen Hughes employes and associates also are named as defendants.

One of the Hughes companies, Hughes Air Corp., currently operates the acquired carrier as Hughes Air West.

A default finding against Mr. Hughes technically would move the SEC a step closer to winning its case and to obtaining its proposed remedy that the defendants, principally Mr. Hughes, be required to "disgorge" an estimated $50 million of monetary benefits resulting from the take over.

However, the extent to which the Hughes defense would be hurt by the default -- if, indeed, it would be hurt at all -- isn't clear. At the least, the prospective rulings by Judge Zirpoli appear likely to trigger appeals by the sizable Hughes legal defense team that could take months and perhaps years to settle.

Chill, Criminal Case

Judge Zirpoli, more than a year ago, found Mr. Hughes in default in a separate civil suit brought against him by the former trustees of Air West. That order was appealed to the federal appeals court in San Francisco which has yet to rule.

An even broader issue likely to be raised on appeal is whether Mr. Hughes and certain of the other defendants must answer the SEC charges while a separate criminal indictment based on the Air West take over also is pending against them. Although a federal judge in Reno, Nev., dismissed the indictment in November 1974, the Justice Department is appealing his decision.

The SEC suit has been complicated further by an unusual number of pretrial disputes, not the least of them over Mr. Hughes' failure to show up for a deposition at the SEC's San Francisco office last Nov. 21. His lawyers offered Judge Zirpoli several justifications for his failure to appear, including the claim that the SEC hasn't linked Mr. Hughes personally with the alleged law violations.

In their submissions to Judge Zirpoli, the Hughes lawyers also argued that their missing client shouldn't be judged in default until the appeals court rules on the default order in the civil suit.

Judge's Comments

Nevertheless, at the Jan. 30 hearing, Judge Zirpoli asserted at one point: "Hughes willfully failed to appear for his deposition and now must face the consequences." And at another point in the hearing he said: "I will enter his default. I have no quarrel about entering his default."

A default order would bar Mr. Hughes from active participation in his own defense. But presumably any pretrial actions that might have been taken on his behalf, such as obtaining the disclosure of government documents, will be undertaken in behalf of the other defendants. Judge Zirpoli, for his part, observed that "the court does not see that the presence or absence of Hughes as an active defendant will make much difference."

In opposing an injunction against Mr. Hughes, his attorneys cited an 1972 Supreme Court decision that barred the entry of a judgment against one of several defendants accused of fraudulently selling a commonly owned tract of land. Despite that precedent, "the SEC would probably be entitled to a preliminary injunction" against Mr. Hughes once it goes through the formality of submitting the "appropriate findings of fact and conclusions of law," Judge Zirpoli said.

An SEC lawyer said the commission plans to submit the necessary papers for both a default and injunction order within the next few weeks.

New Disputes Possible

The next few weeks also could see an outbreak of new disputes between the SEC and Hughes lawyers over answers to SEC interrogatories due next month.

One of these asks the Hughes defendants to disclose any "meetings, contacts or communications" they may have had with representatives of the Justice Department, the SEC, "the Office of the President" or any other arm of the federal government about the indictments or the commission complaint.

The interrogatories also ask the defendants to "state whether Hughes is alive" and "the last date, time and place" they spoke to, or saw, Mr. Hughes.

APPENDIX R

SERVICE DATE: Friday, 8/27/71-
TIME: Approximately at 6:35 P.M.
RONALD THEIN
DEPUTY SHERIFF

OFFICE OF EARL B. WHITMORE SHERIFF
HALL OF JUSTICE REDWOOD CITY, CALIF. 364-1811

JOEL A. PUTKEY
Attorney at Law
6767 Mission Street
Daly City, California 94014

Telephone: 755-1616

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF SAN MATEO

CECIL E. POPE and MARGARET S. POPE, his wife,

Plaintiffs,

vs.

BLANCHE DAVID, et al.,

Defendants.

NO. 148707

ORDER OF EXAMINATION

TO: BLANCHE DAVID

It is hereby ordered that you, the judgment debtor, personally appear on September 24 1971, at 9:30 a.m., in the Department of the Presiding Judge of the above-entitled Court, Hall of Justice and Records, Redwood City, California before a Judge of the above entitled Court, or a referee appointed by him to then and there answer concerning your property as set forth in this application attached hereto.

Dated: This 18 day of August, 1971.

G. Brooks Jr.
JUDGE OF THE SUPERIOR COURT

Compliance with this Order can only be executed by the Court Failure to appear constitutes CONTEMPT OF COURT.

PUTKEY LAW OFF.

APPLICATION FOR ORDER OF EXAMINATION

For the purpose of securing an order requiring BLANCHE DAVID, judgment debtor, in the above-entitled action to appear and answer concerning her property, applicant represents as follows:

1) That judgment was entered in the above-entitled action on October 2, 1970 against the above named debtor; that said judgment has not been satisfied; that said debtor's residence or place of business is in the County of San Mateo, or within 150 miles of the place of trial.

2) That the above-named debtor has been previously examined zero (0) times.

Executed on August 10, 1971, at Daly City, California.

I declare under penalty of perjury that the foregoing is true and correct.

JOHN A. PUTKEY
Attorney for Plaintiffs

JOHN A. PUTKEY
ATTORNEY AT LAW
6767 Mission St.
Daly City, Calif. 94014
755-1616

(ENDORSED)
FILED
OCT 5 - 1971
MARVIN CHURCH, County Clerk
By MARGOT JOYCE
DEPUTY CLERK

ORVILLE I. WRIGHT
220 Montgomery Street
San Francisco, Calif. 94104
Tel. 392 - 2914

Attorney for BLANCHE DAVID
For Deposit of Undertaking

SUPERIOR COURT FOR THE COUNTY OF SAN MATEO

Pope
vs.
David, et al

NO. 148 707

AUTHORIZATION FOR CLERK TO COLLECT BONDS DEPOSITED IN LIEU OF UNDERTAKING

WHEREAS, defendant BLANCHE DAVID is required to file an undertaking pending appeal from judgment taken against her in subject proceeding, she has elected to file United States 6% Treasury Notes in the face amount of $ 9000.00 plus interest coupons, said bonds becoming due on November 15, 1972. Said bonds are numbered 912, 913, 918, 931, and 773 and are attached hereto.

NOW, THEREFORE, BLANCHE DAVID hereby authorizes the Clerk of the Court to collect or sell said notes so deposited if the judgment appealed from, or any part thereof, be affirmed or the appeal be dismissed, and pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed to plaintiff together with all damages and costs which may be awarded against the appellant upon the appeal; BLANCHE DAVID shall have thirty days after the filing of the remittitur from the appellate court in the Court from which the appeal is

taken to pay said judgment, and, if BLANCHE DAVID does not so pay, the notes may be sold and the proceeds distributed as by the statute in such cases made and provided, in the following order: first, to pay the cost of sale of such bearer notes; second, to pay the amount of the judgment or the part thereof affirmed; and third, the remainder, if any, shall be delivered to the appellant.

DATED: October 4, 1971.

ORVILLE I. WRIGHT
Attorney for BLANCHE DAVID
for Deposit of Undertaking

It is hereby stipulated that the bearer bonds described above constitute good and sufficient security to stay execution of judgment against BLANCHE DAVID pending her appeal.

DATED: October 5, 1971.

JOHN PUTKEY
Attorney for Plaintiff

taken to pay said judgment, and, if BLANCHE DAVID does not so pay, the notes may be sold and the proceeds distributed as by the statute in such cases made and provided, in the following order: first, to pay the cost of sale of such bearer notes; second, to pay the amount of the judgment or the part thereof affirmed; and third, the remainder, if any, shall be delivered to the appellant.

DATED: October 4, 1971.

ORVILLE I. WRIGHT
Attorney for BLANCHE DAVID
for Deposit of Undertaking

It is hereby stipulated that the bearer bonds described above constitute good and sufficient security to stay execution of judgment against BLANCHE DAVID pending her appeal.

DATED: October , 1971.

JOHN PUTKEY
Attorney for Plaintiff

The following Treasury Notes were received 10/5/71

#912 - $1,000.00 with three coupons due 11/15/71, 5/15/72 & 11/15/72
#913 - $1,000.00 " " " due as above
#918 - $1,000.00 " " " due as above
#931 - $1,000.00 " " " due as above
#773 - $5,000.00 " " " due as above

(Notes placed in ~~safe in vault~~ Safety deposit box. M.J.)

Margot Joyce
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

CECIL E. POPE, et. al.
Plaintiff(s)

vs.

BLANCHE DAVID, et. al.
Defendant(s)

No. 148 707

ORDER FOR SALE OF NOTES

NOTICE OF ENTRY OF JUDGMENT

NOTICE IS HEREBY GIVEN that judgment in the above numbered and entitled action was entered in the Judgment Book of this court on July 5, 1973, in Volume No. 410, Page 1767

Dated July 6, 1973

MARVIN CHURCH, Clerk

By GLORIA SULLIVAN, Deputy Clerk.

CERTIFICATE OF MAILING

I declare under penalty of perjury that on July 6, 1973 I deposited in the United States Post Office at Redwood City, in said County of San Mateo, State of California, a true copy of the above notice, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to John A. Putkey 6767 Mission St. Daly City, CA 94014
Joseph Jedalken 1224 Hearst Blvd. SF, CA 94103
Barbagelata, et. al. 109 Geary St. SF, CA 94108
Blanche A. David 2826 Tiburon Way Burlin-game, CA 94010

Executed on July 6, 1973 (Date), at Redwood City, California.

MARVIN CHURCH, Clerk

By _____, Deputy Clerk.

NOTICE OF ENTRY OF JUDGMENT 219-1

tender of the amount due with interest and costs at the proper time, relief would have been given—in the former case in equity by injunction, and in the latter by motion and stay of execution. 3 Story, Eq., secs. 1315, 1316; *Wadman* v. *Calcraft*, 10 Ves., Jr., 69; *Hill* v. *Barclay*, 18 Ves., Jr., 63. Where it is necessary to take an account between the parties, no tender need be made before bringing the bill. *O'Mahony* v. *Dickson*, 2 Sch. & Lef., 400; *O'Connor* v. *Spaight*, 1 Sch. & Lef., 305. This subject was fully examined in *Sheets* v. *Selden*, 7 Wall., 420 [74 U. S., XIX., 168].

The appellant is entitled to be paid the rent in arrear, and the amount of his expenditures for taxes, both with interest, and the purchase money, before he can be required to convey. All this we understand to be carefully provided for in the decree of the court below. The directions for taking the account are clear and explicit. The appellant is entitled to nothing more.

We have found no error, and the decree is affirmed.

Cited—20 Wall., 413; 11 Bank. Reg., ——.

THOMAS J. FROW, *Appt.*,

v.

THOMAS DE LA VEGA.

(See S. C., 15 Wall., 552-554.)

Final decree against one of several defendants in joint action—default of one—effect of dismissal on the merits.

1. A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others.

2. If one of several defendants to a bill making a joint charge of conspiracy and fraud, make default, his default and a formal decree *pro confesso* may be entered; but no final decree on the merits until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court, and can take no further part in the case.

3. If the bill in such case be dismissed on the merits, it will be dismissed as to the defendant in default as well as the others.

[No. 60.]

Submitted Nov. 13, 1872. Decided Dec. 9, 1872.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

The bill in this case was filed in the court below by the defendant in error, to restrain respondents from claiming title to certain lands, and for other relief against their alleged fraud. A decree having been entered against one of the respondents, he took an appeal to this court.

The case is fully stated by the court.

Messrs. **P. Phillips** and *W. G. Hale*, for appellant.

Mr. **T. J. Durant**, for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

The appellant, a resident of Alabama, was one of fourteen defendants to a bill filed by the appellee in the court below, charging eight of them, including the appellant, with a joint conspiracy to defraud the appellee, complainant, out of a large tract of land in Texas, by the use of a forged power of attorney, purporting to be executed by the complainant, and by various conveyances and *mesne* conveyances, designing a false and fraudulent title from him. The other defendants have all put in answers to the bill in the merits; but the appellant's answer having been delayed, as he insists, by misunderstanding, sickness and other accidents, a decree *pro confesso* was taken against him at September Rules, 1868; and notwithstanding he afterwards prepared his answer and asked leave to file it (being in substance the same as the answers of the other defendants) yet the court afterwards, on the 23d of March, 1870, on application of the complainant, and against the protestation of the appellant, made a final decree absolute against him, adjudging the title of the land to be in the complainant, and awarding to him a perpetual injunction as against the appellant. From this decree the present appeal was taken.

The question is, whether the court, in such case as this, could lawfully make a final decree against one defendant separately on the merits, whilst the cause was proceeding undetermined against the others. If it could be done, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants, and another decree disaffirming the said charge, declaring it to be entirely unfounded and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. For, after this final decree against the appellant, the court proceeded to try the issues made by the answers of the other defendants, and decided the merits of the cause adversely to the complainant, and dismissed his bill. This fact is made to appear by the return to a *certiorari* sued out by the appellee himself.

Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York Court of Errors, in the case of *Clason* v. *Morris*, 10 Johns., 524. Spencer, J., says: "It would be unreasonable to hold that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree." See, 1 Hoff. Ch. Pr., 554.

Irregularities, if any occurred in the proceedings after the decree complained of, are not now before us for adjudication.

See 13 WALL.

The decree is reversed, with costs, and the cause remanded for further proceedings in conformity with this opinion.

Cited—8 Wood, 548.

Head notes by Mr. Justice BRADLEY.

as the Congress intended, so that the rights of individual union members may be suitably protected without unnecessary delay. Thus, if unavoidable or excusable delay prolongs the determination of a suit brought under 29 U.S.C. § 481 to set aside an election, and it appears that another election may be held and new officers installed, before the suit may be determined, the Secretary must make prompt and timely application to the district court to stay such election. This is what the Secretary did in Writz v. Local Unions Nos. 545, et al.

The district courts should give these matters prompt attention and preferential treatment. In addition, this court stands ready to do whatever may be necessary to expedite the consideration of any such matter which may be ripe for its attention.

Ida Mae LUNDERVILLE, Plaintiff-Appellee,

v.

James K. ALLEN, Defendant-Appellant.

No. 16, Docket 30320.

United States Court of Appeals
Second Circuit.

Argued Sept. 22, 1966.

Decided Sept. 23, 1966.

Plaintiff moved for judgment by default alleging failure of defendant timely to answer plaintiff's complaint. The United States District Court for the District of Vermont entered default judgment in favor of plaintiff, and defendant appealed. The Court of Appeals held that in order to prevent possible miscarriage of justice Court of Appeals would afford appellant an opportunity to defend plaintiff's complaint upon merits, although issue had not been timely joined in court below.

Judgment for plaintiff vacated, and cause remanded.

Courts ⇐406.9(9)

In order to prevent possible miscarriage of justice Court of Appeals would afford appellant an opportunity to defend plaintiff's complaint upon merits, although issue had not been timely joined in court below and default judgment had been entered.

Lisman & Lisman, Burlington, Vt., for plaintiff-appellee.

McNamara & Larrow, Burlington, Vt., for defendant-appellant.

Before WATERMAN, MOORE and ANDERSON, Circuit Judges.

PER CURIAM:

A motion for judgment by default alleging failure of defendant-appellant timely to answer plaintiff's complaint was granted in the court below. Defendant-appellant on appeal maintains that, too hastily under the circumstances of this particular case, he has been deprived of his day in court and has been inequitably prevented from defending upon the merits.

It indeed appears that the court below has a heavy docket and that it must of necessity and as a general rule, in that busy court, dispose of cases with dispatch where issue is not timely joined. Nevertheless, in order to prevent a possible miscarriage of justice, in this particular case it is desirable to afford appellant an opportunity to defend plaintiff's complaint upon the merits.

The judgment for plaintiff is ordered vacated and the cause is remanded for further proceedings below.

13. Trade Regulation ⇐422

Where a claim under Lanham Act section making actionable the use of a false designation of origin or any false description of one's products is coupled with a claim of trademark infringement, plaintiff must establish that defendant's goods are likely to be thought to have originated with, or to have been sponsored by, the true owner of the mark. Lanham Trade-Mark Act, §§ 32(1), 43(a), 15 U.S.C.A. §§ 1114(1), 1125(a).

14. Trade Regulation ⇐383

Proof of plaintiff, which alleged a violation of Lanham Act section making actionable the use of a false designation of origin or any false description of one's products, was insufficient to show that goods of defendant, which sold only piece goods, which were eventually used in women's slacks, skirts, dresses and coats, to garment manufacturers and to the fabric departments of stores, were likely to have originated with plaintiff, which sold finished goods such as garters and girdles to the retail trade. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a); General Business Law N.Y. § 368–d.

15. Trade Regulation ⇐360

Plaintiff was not entitled to an injunction, under New York dilution statute providing, inter alia, that likelihood of injury to business reputation or of dilution of distinctive quality of a mark or trade name shall be ground for injunctive relief, where plaintiff, which sold such items as girdles and garter belts to the retail trade, failed to demonstrate a likelihood of confusion between its products and those of defendant, which sold piece goods, which were eventually used in women's slacks, skirts, dresses and coats, to garment manufacturers and to the fabric departments of stores. General Business Law N.Y. § 368–d.

16. Trade Regulation ⇐407

Plaintiff was not entitled to recover from defendant on a theory of unfair competition where plaintiff, which sold such finished items as garter belts and girdles to the retail trade, failed to demonstrate a likelihood of confusion between its goods and those of defendant, which sold piece goods, which were eventually used in women's slacks, skirts, dresses and coats, to garment manufacturers and to the fabric departments of stores.

17. Corporations ⇐507(5)

Valid service of process was not made on first corporation, where record revealed that marshal served both copies of summons and complaint on president of second corporation, and where president of second corporation testified without contradiction that first corporation did not participate in any way in operations of second corporation.

18. Federal Civil Procedure ⇐2419

Where default is entered against one defendant in a multidefendent case, the preferred practice is for the court to withhold granting of default judgment until the trial of the action on the merits against the remaining defendants; if plaintiff loses on the merits, the complaint should then be dismissed against both defaulting and nondefaulting defendants.

Lackenbach & Lackenbach, Mamaroneck (Armand E. Lackenbach, Mamaroneck, N. Y., of counsel), for plaintiff.

Burns, Kennedy, Schilling & O'Shea, New York City (Edward D. Burns, New York City, of counsel), for defendant Hamilton Adams Imports, Ltd.

OPINION

BAUMAN, District Judge.

This is an action for trademark infringement and unfair competition, brought pursuant to the Lanham Act, 15 U.S.C. § 1051 et seq., § 368–d of the General Business Law of New York, McKinney's Consol.Laws, c. 25, and the common law of unfair competition. Jurisdiction is properly vested in this

Fabrics' operations and identified one Piers Lishman as a principal member of the concern. Lishman, of course, was not served. Plaintiff made no attempt to develop a factual record in contravention of these statements, and I am thus constrained to find the service on Banks insufficient to constitute service on Exquisite Fabrics. It is settled that the plaintiff has the burden of proving that the person served was "an officer, a managing or general agent, or . . . [an] agent authorized by appointment or by law to receive service of process" within the meaning of Rule 4(d)(3) of the Federal Rules. Gottlieb v. Sandia American Corporation, 452 F.2d 510 (3rd Cir. 1971); Dominguez v. National Airlines, Inc., 42 F.R.D. 35 (S.D.N.Y. 1966). Since I am presented only with Banks' uncontradicted testimony, I cannot conclude that plaintiff has met that burden.

[18] Even if I were to find service of process on Exquisite Fabrics to have been valid, plaintiff would not be entitled to a default judgment. When a default is entered against one defendant in a multi-defendant case, the preferred practice is for the court to withhold granting a default judgment until the trial of the action on the merits against the remaining defendants. If plaintiff loses on the merits, the complaint should then be dismissed against both defaulting and non-defaulting defendants.[19] Frow v. DeLaVega, 15 Wall. 552, 82 U.S. 552, 21 L.Ed. 60 (1873); Roach v. Churchman, 431 F.2d 849 (8th Cir. 1970); 6 Moore's Federal Practice ¶ 55.06. The entry of default against Exquisite Fabrics is accordingly vacated and the action dismissed against it as well.

In sum, plaintiff has failed to sustain his burden of proof on any of the four causes of action.[20] The clerk is therefore directed to enter judgment for the defendants dismissing the complaint.

It is so ordered.

19. This rule obtains only where, as here, the liability of the defendants is joint.

20. I therefore need not consider the defense of laches interposed by IIAIL.

ONE 1961 CADILLAC SEDAN DEVILLE, 4-DOOR, MOTOR AND SERIAL NO. 61E012513, and Paul W. Kibby, guardian of said automobile, Plaintiff/Owner,

v.

UNITED STATES of America, Defendant.

No. 73 C 787(3).

United States District Court, E. D. Missouri, E. D.

May 3, 1974.

In an action for return of automobile claimed to have been wrongfully seized, United States moved to dismiss the action. The District Court, Wangelin, J., held that due process required that personal notice be given in case of forfeiture of automobile seized by reason of its involvement in transportation of heroin; and that expiration of six-year limitation period precluded plaintiff's civil action against the United States for return of automobile allegedly wrongfully seized for involvement in transportation of heroin, even though plaintiff had been confined in federal penitentiary during limitation period.

Defendant's motion to dismiss action granted.

1. Constitutional Law ⇨303

Due process required that personal notice be given in case of forfeiture of automobile seized by reason of its involvement in transportation of herion. Contraband Seizure Act, § 1 et seq., 49 U.S.C.A. § 781 et seq.

2. Limitation of Actions ⇨95(1)

Even if a plaintiff claims lack of knowledge as to existence of cause of action against United States for return of automobile allegedly wrongfully seized and forfeited, such ignorance generally will not suspend accrual. 28 U.S.C.A. § 2401.